



Diriye & another v National Project Coordinator, Kenya Development Response to Displacement Impacts Project (KDRDIP) & 2 others; Shuriye & another (Interested Parties) (Petition E005 of 2024) [2025] KEHC 1872 (KLR) (10 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1872 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA**

PETITION E005 OF 2024

JN ONYIEGO, J

FEBRUARY 10, 2025

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS AS ENSHRINED UNDER ARTICLES 27(1) & 2, 47 & 35(2) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES 10, 27(1) & (2), 35(2), 43 (1) (F), 47, 73(1) & (2), 227(1) & (2) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ACTUAL, CONTINUING AND IMMINENT VIOLATION OF THE LEADERSHIP AND INTEGRITY ACT, 2012 AND IN THE MATTER OF: ACTUAL, CONTINUING AND IMMINENT VIOLATION OF THE BASIC EDUCATION ACT, 2013

AND

IN THE MATTER OF: ILLEGAL CONSTITUTION OF BORANSIS PRIMARY SCHOOL BOARD OF MANAGEMENT IN DADAAB SUB COUNTY COMPONENT ONE SUB PROJECTS FY 2023 – 2024 1ST HALF AIE.

BETWEEN

ABDIFATAH MAULID DIRIYE 1ST PETITIONER

HASSAN KHALIF 2ND PETITIONER

AND

NATIONAL PROJECT COORDINATOR, KENYA DEVELOPMENT RESPONSE TO DISPLACEMENT IMPACTS PROJECT (KDRDIP) 1ST RESPONDENT

COUNTY PROJECT COORDINATOR, KENYA DEVELOPMENT RESPONSE TO DISPLACEMENT IMPACTS PROJECT (KDRDIP) 2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT



AND

IDIRIS BUTHULE SHURIYE INTERESTED PARTY

YAKUB FARAH INTERESTED PARTY

JUDGMENT

1. The petitioners herein moved this court via a petition dated 07.02.2024 seeking prayers listed hereunder:
 - i. A declaration that the petitioners' fundamental rights and freedoms as enshrined under articles 27(1) & (2), 47 & 35(3) of *the constitution* of Kenya 2010, have been contravened and infringed upon by the 1st and 2nd respondents and the interested parties herein.
 - ii. A declaration that the respondents' decision in awarding the listed project of number 6 in Dadaab Sub county component one Sub Projects Financial Year 2023-2024 1st Half AIE breached articles 10,27, (1) & (2) ,35(2),43 (1) (f).47,73(1) & (2), 227(1) & (2) of *the constitution* of Kenya.
 - iii. An order of certiorari quashing the implementation of the listed project of number 6 in Dadaab Sub county component one Sub Projects Financial Year 2023-2024 1st Half AIE.
 - iv. An order of mandamus compelling the 1st and 2nd respondents to stop the intended channeling and/or depositing of funds to the account of the Community Project Management Committee Accounts and/or the BOM.
 - v. An order of mandamus compelling the 1st and 2nd interested parties to restart the tendering and/or the process of identifying the legally constituted Board of Management of Boransis Primary School by publicly calling on the residents and/or the parents of Boransis village.
 - vi. A declaration directing the 1st and 2nd respondents and the interested parties to take all the legal steps as laid down in articles 10,27, (1) & (2) ,35(2),43 (1) (f).47,73(1) & (2), 227(1) & (2) of *the constitution* of Kenya, laws and regulations of *Public Procurement and Asset Disposal Act*, 2015, *Leadership and Integrity Act*, 2012 and the Fair Administrative Actions Act 2015.
 - vii. A declaration that the 1st and 2nd interested parties to revoke the certificate of award to direct the respondents in carrying out their mandate independently and their subsequent commission of any action is thus unconstitutional, illegal and null and void ab initio.
 - viii. A conservatory order in the nature of a permanent injunction directed towards the 1st and 2nd interested parties restricting/prohibiting from interfering in whatever nature with the tendering process and the implementation of the project.
 - ix. Any other orders and directions as this Honourable Court may consider appropriate in the circumstances.
2. A brief background of this matter stems from the fact that the World Bank through Kenya Development Response to Displacement Impacts Project (KDRDIP) in conjunction with the national government of Kenya is funding and implementing various projects in Dadaab Constituency. That the said projects dubbed Dadaab Sub County Component One Subprojects Financial Year 2023 – 2024 1st Half AIE are carried out in accordance with the developmental needs of the local community.



Additionally, the developmental projects are to be implemented in the Sub Counties of Dadaab Constituency in the current Financial Year of 2023 – 2024.

3. The 1st respondent listed various projects to be implemented throughout the different sub counties in the larger Dadaab constituency while allocating budgetary cost for the said projects. That Boransis primary school, hereinafter the school was to benefit from the said projects in regards to construction of three staff quarter that was to cost Kes. 4,500,000/-. This was allegedly based on the understanding that the school was in need of staff quarters among other pressing needs. That the teachers mostly hailing from outside Dadaab constituency were sheltered in a makeshift mosque/prayer area that the local village had allowed to be used as a temporary staff quarter hence the need for proper staff quarters.
4. It was the petitioners' case that the school's board of management to which they were members made proposals to various developmental organizations to have staff quarters and other improvements done in the school for the benefit of the learners. It was averred that the BOM was formed as per the requirements of the *Basic Education Act* and competently instituted. It was further contended that the said BOM elected the 1st petitioner as the chair with other members being: Abdifatah Maulid Diriye, Abdi Aden Mohamed, Naow Hassan Farah, Oyale Mohamed Rashid, Sahara Ibrahim Ali, Omar Hassan Gedi, Nasri Aden Muhumed, Hassan Aden Budhul and Suleiman Aden Muhumed.
5. That thereafter, some unscrupulous entrepreneurs hurriedly and with no colour of shame proposed new names which were allegedly forwarded to the 1st interested party who approved the same as the School's BOM. That the 1st interested party did not follow the procedures laid down under the *Basic Education Act*, 2013 in the formation of an illegal board of management for Boransis Primary School. It was deposed that, as a consequence, the 2nd interested party approved an illegality for the construction of the school staff quarters.
6. Basically, this petition raises concerns on how the project was implemented by an illegally appointed and approved BOM yet the rightful BOM was not engaged. This court was therefore urged to allow the prayers sought.
7. Ms. Edna Makori, counsel for the respondents filed grounds of opposition dated 12.03.2024 urging that the suit was devoid of merit hence an abuse of the court process. That the suit is intended to derail the implementation and subsequent discharge of the 1st and 2nd respondent's statutory mandate and obligations. In the same breadth, it was deposed that the petitioners did not tender evidence to substantiate their claim that the already established BOM was illegally constituted hence illegitimate.
8. That no prejudice was demonstrated that the petitioners are likely to suffer upon the compliance with the laid down tendering requirements, procedures and formalities. In the end, this court was urged to dismiss the suit with costs as the same was destitute of merit. It is however worth noting that the interested parties did not file any response to the petition.
9. The court directed that the petition be canvassed by way of written submissions. The petitioners vide their submissions dated 17.04.2024 urged that the suit project was carried without public participation in that, the respondents and the interested parties called a few of their friends to support the project and thereby purported that the aspect of public participation had been met.
10. That the proper guidelines for the selection of the disputed BOM ought to have been open, transparent, clear and in observance of integrity. The petitioners relied on the case of Independent Electoral and Boundaries commission (IEBC) vs National Super Alliance (NASA) Kenya & 6 others [2017] eKLR where it was held that the values of art 10(2) of *the constitution* are neither aspirational nor progressive. In the same breadth, further reliance was placed in the case of In the Matter of Peter Makau Musyoka and Award of Mining concessionary Rights to the Mui Coal Basin Deposits Constitutional



Petition No. 305 of 2012 [2015] eKLR where the Supreme court stated that ...public participation is a national value that is an expression of the sovereignty of the people.

11. It was argued that the rights of the petitioners and the entire Boransis village in Deru Ward as protected under chapter 4 of *the constitution* were infringed. The petitioners relied on the case of Edward Akong'o Oyugi & 2 Others vs Attorney General [2019] eKLR where the court held that the purpose of public law is not only to civilize public power but also to assure the citizens that they live under a legal system which aims to protect their interests and preserve their rights. On costs, the petitioners argued that in as much as the same was a discretion of the court, it was proper and mete that they be awarded the same. To that end, this court was urged to allow the petition as prayed.
12. The respondents vide submissions dated 21.05.2024 contended that the petitioners' rights were not infringed in any way and to the contrary, the decisions and actions of the 1st and 2nd respondents were merely made and performed in the exercise of their functions and obligations as provided by the law. To that end, reliance was placed on the case of Boundary Commission (1983) 2 WLR 458,475 where the court reiterated that a court should not usurp the discretion of a public authority. Further, it was contended that the petitioners failed to discharge their burden of proof as it was not established that the BOM established by the 1st and 2nd respondents was unlawfully constituted. To that end, reliance was drawn from section 107 of the *Evidence Act* and the case of Hellen Wangari Wangechi vs Carumera Muthini Gathua (2005) eKLR to the extent that he who alleges must prove.
13. Further, it was urged that the petitioners failed to demonstrate any prejudice suffered even after complying with the laid down tendering requirements, procedures and formalities in the award of the certificate of the suit project. On costs, the respondents urged while placing reliance on section 27 of the *Civil Procedure Act* and the case of Republic vs Rosemary Wairimu Munene ex parte Applicant vs Ihururu Dairy Farmers Co-operatives Society Ltd Judicial Review Application No. 6 of 2014 that the issue of costs is at the discretion of the court. In the end, this court was urged to dismiss the petition herein with costs to the respondents.
14. I have considered the petition together with the response thereof. I have also considered submissions by both parties. In my view, issues that emerge for determination are;
 - a. Whether the alleged new BOM was legally constituted
 - b. Whether the award of the subject tender by the second alleged illegal BOM was irregular for lack of public participation
 - c. Whether the prayers sought can issue
 - d. Who bears the costs.
15. Principally, the petitioners' case is anchored on three grounds; that, some unscrupulous entrepreneurs hurriedly and with no colour of right or shame proposed names, forwarded and had them approved as the Boransis school BOM; that the subject project was undertaken and awarded without the residents' approval or public participation; that the subject contract was irregularly awarded.
16. In opposing the petitioners case, the respondents urged that the petitioners failed to discharge their burden of proof as it was not established that the BOM established by the 1st and 2nd respondents were unlawfully constituted. Additionally, it was alleged that the petitioners did not demonstrate any prejudice suffered even after complying with the laid down tendering requirements, procedures and formalities in the award of the certificate of the suit project.



17. Regarding the existence of an illegal BOM, the petitioners have a duty to state with specificity or precision on what irregularity was committed hence the question of unconstitutionality with specific reference to the constitutional provision breached or threatened to be infringed. See the case of Anarita Karimi Njeru vs Republic (1979) eKLR and Mumo Matemo v Trusted Society of human rights Alliance & 5 others (2014) eKLR where both courts emphasized on the threshold for a constitutional petition to hold as proof with a reasonable degree of precision the constitutional provision breached and how.
18. The burden of proof therefore was incumbent upon the petitioners to prove that the respondents and the interested parties acted in breach of the constitution by recognizing a purported illegal Boransis primary school BOM.
19. The issue of the burden of proof has two facets. These are the legal burden of proof and the evidential burden of proof.
20. Sections 107(1), (2) and 109 of the Evidence Act, Cap. 80 of the Laws of Kenya deals with the burden of proof. They state as hereunder:
 - Sections 107(1) and (2):
 1. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
21. Section 109 on proof of particular fact stipulates that the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
22. The foregoing provisions bring out what is referred to as the legal burden of proof. That burden remains on the person making the claims throughout the case.
23. There is also the evidential burden of proof. This legal principle was discussed in Bungoma High Court Election Petition No. 2 of 2017 Suleiman Kasuti Murunga v IEBC & 2 Others [2018] eKLR as under: -
 26. The Petitioner on whom the legal burden of proof lies may or may not adduce sufficient and admissible evidence in proof of any of the allegations in the Petition. On one hand, if no sufficient evidence is adduced to the required standard, then the allegation(s) fail and it all ends there. On the other hand, if evidence is adduced to the satisfaction of the Court that an election ought to be impugned, then it becomes the burden of the Respondent(s) to adduce evidence rebutting the allegations and to demonstrate that the law was complied with and/or that the irregularities did not affect the result of the election. At that point the burden is said to shift to the Respondents. That is the evidential burden of proof.
 27. ...
 28. The Supreme Court in the 2017 majority judgment had the following to say on the evidential burden of proof in paragraphs 132 and 133 thereof as follows: -
 - (132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges



this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

(133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law....

24. It therefore follows that, whereas the legal burden of proof is static and rests on the claimant throughout the trial, the evidential burden of proof may shift to the other party(ies) depending on the nature and effect of evidence adduced by the claimant.
25. In the instant case, the evidence annexed to the pleadings herein to assist the court determine these issues were mainly a list of the alleged properly constituted BOM, copies of identification cards of the petitioners, a photo of two rolls of barbed wires, a photo of a heap of stones, a photo of bags of probably cement, a complaint letter to the 1st respondent and a list of subprojects for the sub county.
26. While revisiting the case of *Hellen Wangari Wangechi v Carumera Muthini Gathua* [2005] eKLR, as cited by the learned counsel for the respondents, Mativo J. (as he was) stated that:

“Whether one likes it or not, the legal burden of proof is consciously, or unconsciously the... test applied when coming to a decision in any particular case. The fact was succinctly put forth by Rajah JA in *Britestone PTE Ltd v Smith & Associates Far East Ltd* [2007] 4SLR (R) 855 at 59: ‘The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him.’”
27. Whereas it was alleged that the said projects were proposed by an illegal BOM, the court was not furnished with the list or names of the members considered as the illegal BOM. No evidence was led to demonstrate that indeed, there existed the alleged illegal BOM. In short, there was no proof tendered by the petitioners to support their allegations. I say so for the reason that the allegations by the petitioners were denied by the respondents, thus the probability of existence of the illegal BOM was left hanging.
28. Ordinarily, it was incumbent upon the petitioners to dig deeper and demonstrate by way of evidence that indeed, the team led by the 1st petitioner was the competent BOM and the other ‘one’ was not. Further, it was incumbent upon the petitioners to have even enjoined the members of the alleged illegal BOM as parties so that they could defend their positions or themselves rather than being condemned unheard.
29. Besides, there was no specific provision of the *Basic Education Act* that was infringed. It therefore follows that the probability of the existence or non-existence of the competent and illegal BOMs are therefore equal. [See *Miller vs Minister of Pensions* {1947} 2 ALL ER 372].
30. Since the burden of proving the existence of a competent BOM and an illegal BOM was the responsibility of the petitioners, and no evidence was produced to support the same, it is my finding that the claim of an illegal BOM is an allegation without basis hence no proof of constitutional breach in regards to that issue.



31. Concerning the question of lack of public participation in the contract award, the same is irrelevant. The purported contract being challenged being a public procurement process, is governed by the Public procurement and Asset Disposal Act of 2015 (hereafter the PP & ADA). The rules of the game are therefore specific hence the element of public participation does not arise. Since the petitioners did not take part in the tendering process as bidders, their only recourse would have been under Section 9 of the PP & ADA which provides;

“Section 9. Functions of Authority

- (1) The functions of the Authority shall be to—
 - (a) monitor, assess and review the public procurement and asset disposal system to ensure that they respect the national values and other provisions of the Constitution, including Article 227 and make recommendations for improvements;
 - (b) monitor the public procurement system and report on the overall functioning of it and present to the Cabinet Secretary and the county executive member for finance in each county, such other reports and recommendations for improvements;
 - (c) enforce any standards developed under this Act;
 - (d) monitor classified procurement information, including that of specific items of security organs and make recommendations to the Cabinet Secretary;
 - (e) monitor the implementation of the preference and reservation schemes by procuring entities;
 - (f) prepare, issue and publicise standard public procurement and asset disposal documents and formats to be used by public entities and other stakeholders;
 - (g) provide advice and technical support upon request;
 - (h) to investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review;
 - (i) research on the public procurement and asset disposal system and any developments arising from the same;
 - (j) advise the Cabinet Secretary on the setting of standards including international public procurement and asset disposal standards;
 - (k) develop and manage the State portal on procurement and asset disposal and ensure that it is available and easily accessible;
 - (l) monitor and evaluate the preference and reservations provided for under this Act and provide quarterly public reports;
 - (m) create a central repository or database that includes—



- (i) complaints made on procuring entities;
 - (ii) a record of those prohibited from participating in tenders or those debarred;
 - (iii) market prices of goods, services and works;
 - (iv) benchmarked prices;
 - (v) State organs and public entities that are non-compliant with procurement laws;
 - (vi) statistics related to public procurement and asset disposal;
 - (vii) price comparisons for goods, services and works; and
 - (viii) any information related to procurement that may be necessary for the public;
- (n) inform, as applicable, the Cabinet Secretary, Parliament, the relevant County Executive member for finance, the relevant County Assembly or Auditor-General on issues of non-compliance with procurement laws once the relevant State organ or public entity ignores the written directives of the Authority, including material breaches of the measures established under this Act;
 - (o) generally report to Parliament and the relevant county assembly;
 - (p) develop a code of ethics to guide procuring entities and winning bidders when undertaking public procurement and disposal with State organs and public entities;
 - (q) in undertaking its functions, cooperate with state and non-state actors with a view to obtaining recommendations on how public procurement and disposal can be improved;
 - (r) ensure the procurement entities implement the preference and reservations and provide data to the Authority disaggregated to indicate the number of disadvantaged groups that have benefitted;
 - (ra) develop, promote and support the training and capacity development of persons involved in procurement and asset disposal;
 - (s) perform such other functions and duties as are provided for under this Act and any other relevant law.
- (2) If in the course of monitoring in accordance with section 9(1)(a), the Authority is of the opinion that civil or criminal proceedings ought to be



preferred against a State Organ, public entity, state officer or public officer, the Authority shall refer the matter to the relevant authorities.

32. In my view, the question of public participation was not necessary in the circumstances. Having held as above, I do not find any specific proof on the alleged constitutional breaches in respect of any of the cited constitutional provisions. Accordingly, none of the reliefs sought is capable of being granted.
33. On costs, it is trite that the same is at the discretion of the court. I note that the suit herein was brought in reference to the alleged wellbeing of Boransis Primary School and the entire Boransis village. I will therefore exercise my discretion by ordering that each party bears own costs on grounds that this is a public interest litigation.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 10TH DAY OF FEBRUARY, 2025

J. N. ONYIEGO

JUDGE

