Kano & another v Cabinet Secretaty Ministry of Interior & Co-ordination & another (Petition E019 of 2024) [2025] KEHC 2243 (KLR) (18 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2243 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

PETITION E019 OF 2024

JN ONYIEGO, J

FEBRUARY 18, 2025

IN THE MATTER OF; ARTICLES 1, 2, 3, 10(2), 20, 21, 22, 23, 118, ARTICLE 189 (1) OF THE CONSTITUTION

AND

IN THE MATTER OF; CONTRAVENTION OF ARTICLES 1, 10, 11, 19(2), 44(2), 47 AND 56 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF; ARTICLES 165(3)(D)(II) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: BREACH OF THE RIGHT TO FAIR ADMINISTRATION ACTION

AND

IN THE MATTER OF: NATIONAL GOVERNMENT COORDINATION ACT 2013

BETWEEN

MOHAMEDNUR ABDOW KANO ..... 1ST PETITIONER

AHMED ABDI ALI ..... 2ND PETITIONER

AND

CABINET SECRETATY MINISTRY OF INTERIOR & CO-ORDINATION ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

RULING

1. *Vide* a petition dated 4.12.2024, the petitioners sought the following reliefs;

    i. A declaration that the establishment of the new administrative units namely Wajir North Sub County Location Qafole, Watiti Dini, Karaduse, Danaba North and Sub Location Welmura, Danaba North, Fargadud and Medina, Buna Sub County division Malkagufu, Location Detacgdera, Suraya, Luqe, Sub Location Detachdera, Luqe and Bero vide Gazette Notice Number 15341 Vol. CXXVI No. 203 of 22nd November 2024 was conducted without any or adequate public participation.

    ii. A declaration that there was no public participation resulting in recommendations for the creation of the impugned administrative units.

    iii. A declaration that the entities purportedly created and described as 'divisions' are not known to law and there is no legal basis for their creation.

    iv. A declaration that the boundaries for those units have not been identified and demarcated vis-à-vis existing electoral boundaries.

    v. An order of certiorari bringing into this Court and quashing Gazette Notice Number 15341 Vol CXXVI No. 203 of 22nd November 2024 establishing the impugned administrative units and addresses to all regional commissioners operationalizing the impugned new administrative units namely; Wajir North Sub County Location Qafole, Watiti Dini, Karaduse, Danaba North and Sub Location Welmura, Danaba North, Fargadud and Medina. Buna Sub County division Malkagufu, Location Detacgdera, Suraya, Luqe, Sub location Detchdera, Luqe and Bero.

    vi. Costs of and incidental to this petition.

2. The petition is anchored on grounds set out on the face of it and further amplified by the averments contained in the affidavit in support sworn on 4.12.2025 by the 1st petitioner. It was averred that on or about 22.11.2024, the 1st respondent herein while exercising his mandate as the cabinet secretary for the Ministry of Interior and National Co-ordination vide Gazette Notice No. 15341 Vol. CXXVI No. 203 of 22.11.2024 established new administrative units as service delivery co-ordination units as follows: Wajir North Sub County Location Qafole, Watiti Dini Karuduse, Danaba North, Sub Location Welmura, Fargadud and Medina, Bero Sub Location in Buna Sub County.

3. That the 1st respondent acting under powers conferred on him under section 14(1) of the *National Government Coordination Act*, 2013 established the said administrative units without the participation of the people of Wajir North Sub tribe and Buna sub tribe. It was averred that the exercise was carried out without taking into consideration the likely significant impact on the citizens concerned.

4. It was contended that the petitioners are apprehensive that the 1st respondent's directive if not stayed and set aside, the socio – economic gains materialized by the presence of the sub county offices in Wajir North Sub County and Bero Sub location in Buna Sub County shall be clawed back leading to the marginalization of the region thus defeating the objects of devolution as contemplated in article 174 (c –h) of *constitution*. This court was therefore urged to grant the orders sought.

5. Contemporaneously filed with the petition is a notice of motion of even date seeking;

i. That the application be certified as urgent and service be dispensed with in the first instance.

ii. That this Honourable Court be pleased to issue a conservatory order staying the implementation of the impugned Gazette Notice Number 15341 Vol. CXXVI No. 203 of 22nd November, 2024 that creates the proposed Sub-county namely Wajir North Sub-county location Qafole, Watiti Dini, Karaduse, Danaba North, Sub location Welmura, Fargadud and Medina, Bero Sub location in Buna Sub-county pending the hearing and determination of this application.

iii. That this Honourable Court be pleased to issue a conservatory order staying the implementation of the impugned Gazette Notice Number 15341 Vol. CXXVI No. 203 of 22nd November, 2024 that creates the proposed Sub-county namely Wajir North Sub-county location Qafole, Watiti Dini, Karaduse, Danaba North, Sub location Welmura, Fargadud and Medina, Bero Sub location in Buna Sub-county pending the hearing and determination of the petition filed herewith.

iv. That this Honourable Court be pleased to issue any other order it may deem just and fit in the interest of justice.

v. Costs of the application.

6. The application is supported by an affidavit sworn on 4.12.24 by the 1st petitioner/applicant on his own behalf and that of the co-petitioner.

7. Despite service of the said application, the respondents did not file any response. The matter then proceeded exparte with Ms Okoth counsel for the applicant basically urging the Court to allow the application unopposed.

8. It is trite that an application that is not opposed need not automatically succeed. The applicant has a duty to prove his case and the court will determine the same on merit. See *Sitelu Konchellah vs Julius Lekakeny Ole Sunkuli & Sunkuli & 2 others* (2018) eKLR.

9. The only issue for determination is; whether the applicants have met the threshold for grant of the conservatory order sought. A conservatory order is in its very nature, a temporary relief issued by a court of law to stop a certain act from happening or continuing to happen pending issuance of a substantive order or declaration. In the case of *Invesco Assurance Co.Ltd vs MW(minor suing thro'next friend and mother (HW)*(2016)eKLR , the court held as follows;

> " A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of statusquo for the preservation of the subject matter".

10. The threshold for grant of conservatory orders was established by the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [*supra*] where the apex court held that; -

> " (86) Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the applicant's case for orders of stay. Conservatory orders, consequently, should

be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes." (Emphasis added).

11. The first discernible principle is that the applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory order, he is likely to suffer prejudice. This position was well articulated in the case of *Centre for rights education and awareness (CREAW) and 7 others vs Attorney General* (2011) eKLR. Similar position was held in the case of *Wilson Kaberia Nkunja vs The Magistrate and judges vetting board and others* Nairobi highcourt constitutional petition No. 154 of 2016(2016) eKLR.

12. The second principle is that the Court should decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights. The critical consideration is the question whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether, to grant or deny a conservatory order. [See *County Assembly of Machakos v Governor, Machakos County & 4 others* [2018] eKLR.

13. It is trite that when a court is called upon to determine whether a prima facie case has been established, it should not delve into a detailed analysis of the facts and law but should focus on determining whether the applicant has put forward a case that is arguable and not frivolous. In *Board of Management of Uhuru Secondary School –vs- City County Director of Education & 2 others* [2015] eKLR the Court stated that:

> " 26. It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evidence of a likelihood of success. The prima facie case ought to be beyond a speculative basis..."

14. The applicants are seeking a conservatory order restraining the respondents from creating new administrative units in their area without seeking their views. The applicants are under obligation to prove that they have established a primafacie case to warrant issuance of the conservatory order sought. It is, the applicants' claim that the creation of the disputed administrative units was done without engaging the affected community members in a public participation exercise. This fact was not controverted or at all hence a primafacie case has been established.

15. As regards the question of public interest, it was claimed that relocation of some sections from one unit to the other will affect them economically and socially and that it will result to marginalization and discrimination and distribution of resources. This is not a frivolous argument. It affects an entire section of the population hence a matter of public interest. Indeed, matters of public are critical when assessing whether to grant a conservatory order or not. Naturally, it goes to the core of judicious exercise of discretionary powers by the court. See *Martin Nyaga Wambora v Speaker of County Assembly Embu & 3 others* (2014) eKLR.

16. On the question whether the petition might be rendered nugatory if the prayer is not granted, one would have to look at the consequences of not allowing the application. The ultimate consequence will be, the actualization of the intended division and subsequent allocation of resources may create a challenge to reverse if the petition succeeds. In the circumstances, it is my finding that the petition might be rendered nugatory if the conservatory order is not granted.

17. Regarding the question of prejudice, I do not find any that the respondents will suffer by allowing the application. In view of this finding, it is my holding that the application is merited and the same having not been opposed is allowed as prayed. The interim orders in place shall remain in force till the petition is heard and determined.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF FEBRUARY 2025.

J. N. ONYIEGO

JUDGE