Njapit & 9 others v Cabinet Secretary Ministry of Interior and Coordination of National Government & 3 others (Constitutional Petition E001 of 2024) [2025] KEHC 4770 (KLR) (9 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4770 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

CONSTITUTIONAL PETITION E001 OF 2024

CM KARIUKI, J

APRIL 9, 2025

IN THE MATTER OF: ARTICLES1,2,3,10(2), 19,20, 22, 23(1) & (3), 27(1), (4)(5), 28,35,47(1)(2), 48, 73, 159, 160,165,174(A-I), 236(B), 259, & 260 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: RULES 13, 23, AND 24 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013.

IN THE MATTER OF: SECTION 5-7 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015.

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10(2), 47(1)(2), 174© O FTHE CONSTITUTION OF KENYA, 2010.

IN THE MATTER OF: SECTION 14(1) (2) OF THE NATIONAL GOVERNMENT COORDINATION ACT, 2013.

IN THE MATTER OF: SECTION 48(1) AND (2) OF THE COUNTY GOVERNMENT ACT NO. 17 OF 2012

BETWEEN

DANIEL NJAPIT ..... 1ST PETITIONER

WILLIAM MUNKA ..... 2ND PETITIONER

JAMES KOOL ..... 3RD PETITIONER

TUBULA OLE NCHOE ..... 4TH PETITIONER

JOSEPH NANGIOO ..... 5TH PETITIONER

MEITENGAU OLE KUMA ..... 6TH PETITIONER

DOMINIC YANKERE ..... 7TH PETITIONER

MURANI OLE TARURU ..... 8TH PETITIONER

GERALD MURERO ..... 9TH PETITIONER

HON KANYINKE OLE NABAALA ..... 10TH PETITIONER

AND

THE CABINET SECRETARY MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT ..... 1ST RESPONDENT

HON ATTORNEY FENERAL ..... 2ND RESPONDENT

COUNTY COMMISSIONER NAROK COUNTY ..... 3RD RESPONDENT

GABRIEL KOSHAL TONYOYO MP NAROK WEST ..... 4TH RESPONDENT

RULING

Background

1. The 1st respondent by a Gazette Notice Vol CXXVI-NO. 17 dated 14/02/2024 transferred Narok West Sub-County headquarters from Lemek to Ngo'suani.

2. The petitioners contend that the action of transferring the sub-county headquarters was done without conducting public participation.

3. The petitioners contend that the action will negatively impact on socio-economic prosperity of the residents of Lemek thus defeating devolution. Further, it will lead to overconcentration of public services away from the majority populace thus exposing volatile areas to insecurity and underdevelopment despite strides made in the last 10 years by national and county governments. Therefore, the immense developments made in the last 11 years will go to waste.

4. The petitioners contend that the residents of Lemek had immensely contributed to the development of the sub-county headquarters at Lemek having freely offered approximately 100 acres of their private lands to allow room for expansion and development of sub-county headquarters.

5. The petitioners contend that the Ngo'suani center is located on the furthest end of the Narok West sub-county and borders the Narok South sub-county. The position of Ngo'suani is in the middle of several animal conservancies with limited room for expansion. Accessing Ngo'suani might also be challenging with the high number of wildlife there and human-animal conflicts might increase.

The application

6. Before this court for determination is a notice of motion dated 21/02/2024 filed by the petitioners/applicants herein. The application is premised on Articles 22,23(1)(3), 27(1)(4)(5), 28, 35, 10(2), 47(2), 48,73,159,160,236(b), 259, 260, and 159(2)(d) of *the Constitution*, Rules 23 and 24 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, section 14(2) of the National Government Coordination Act of 2013, section 5(1) of Fair Administrative Act.

7. The petitioners/applicants seek the following orders;

1. Spent.

2. Spent.

3. That pending the hearing and determination of the petition herein, a conservatory order do issue restraining the respondents either by themselves, their agents, assigns, personal representatives, and /or any person acting under their instruction, from transferring/relocating Narok West Sub-County headquarters from Lemek to Ngosuaani as advertised in the Kenya gazette vol CXXVI- NO. 17 dated 14th February 2024.

4. That the respondents do bear the costs of this application.

8. The application is based on the grounds set out on the face of the application and the supporting affidavit sworn by Charles Tubula Nchoe on 21/02/2024.

The response

9. The 2nd respondent opposed the application herein.

10. The 2nd respondent filed grounds of opposition dated 18/03/2024.

11. The respondents contend that the application has not met the threshold for grant of conservatory orders as was held in Ezra Chiloba Vs Wafula Wanyonyi Chebukati & 7 Others [2018] eKLR.

12. The 2nd respondent contends that the impugned notice does not create electoral units but service delivery coordination units only.

13. The 2nd respondent contends that the petitioners have not proved with precision how the actions of the respondents violated *the constitution* but the petition offends the doctrine of separation of powers.

14. The 2nd respondent contends that the petitioners have not demonstrated how they have not been involved in the process of establishing the improved national government service delivery coordination units.

15. The 2nd respondents contend that it would be against the public interest for the gazette notice establishing more than 100 service delivery units across the county to be suspended in its entirety simply because the petitioners have taken issue with just one part of the same.

16. The 2nd respondent contends that the petition is an abuse of the court process as it does not disclose concrete reasonable cause of action against the respondents but is based on apprehension and unfounded fears.

17. The 2nd respondent pointed out that there is another petition Garissa HCPT E008 of 2024, Abdikamil Abbey Shurei & Another Vs Cs Interior and Others which was coming for ruling on 05/04/2024 on a ruling on the application for conservatory orders on the same issue.

Directions of the court

18. The application was canvassed by way of written submissions. The petitioners/applicants have filed. The respondents have not filed.

The Petitioners/applicants' Submissions

19. The petitioners/applicants submitted that it is incumbent upon the applicant to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to

suffer prejudice. The petitioners/applicants relied on the Supreme Court in Civil Application No. 5 Of 2014 Gatirau Peter Munya V Dickson Mwenda Kithinji & 2 Others, Centre For Rights Education and Awareness (CREAW) & 7 Others V Attorney General [2011] eKLR, Wilson Kaberia Nkunja V the Magistrate And Judges Vetting Board & Others Nairobi High Court Constitutional Petition No. 154 Of 2016[2016] eKLR, and Mirugi Kariuki V Attorney General Civil Appeal No. 70 Of 1991[1990-1994] EA 156 [1992] KLR 8.

20. The petitioners/applicants submitted that the petition is arguable as they have made out a prima facie case with a high chance of success. They contend that their rights to participate in an action affecting them was denied by the cabinet secretary. The petitioners/applicants relied on Mrao Ltd V First American Bank Of Kenya Ltd & 2 Others [2003] eKLR, Mugo & 14 Others V Matiangi & Another, Independent Electoral And Boundary Commission Of Kenya & 19 Others (Interested Party) (Constitutional Petition 4 Of 2019)[2022] KEHC 158(KLR)(12 January 2022), The Supreme Court In Petition No. E031 Of 2024 As Consolidated With Petition Nos. E032 & E033 Of 2024

21. The petitioners/applicants submitted that the petitioner will be rendered nugatory unless the orders sought are granted. The petitioners/applicants relied on Bundid & Another V Ministry of East African Community (EAC), The Asals and Regional Development & 3 Others (Petition E002 of 2024) [2024] KEHC 3479(KLR) (26 March 2024) (Ruling)

22. The petitioners/applicants submitted that the petition is a matter of public interest. The petitioners/applicants relied on the black's law dictionary the 10th edition, and Kenya Anti-Corruption Commission Vs Deepak Chamanlal Kamni and 4 Others [2014] eKLR.

Analysis and Determination.

23. This court has considered the application, the supporting affidavit, the grounds of opposition, and the petitioners' submissions.

Issues

24. The main issue for determination: -

i. Whether this application has met the legal threshold for grant of conservatory orders.

25. 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 [2014] eKLR as follows:

> "(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 supplicant'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.
>
> (87) The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. 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. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

(i) the appeal or intended appeal is arguable and not frivolous; and that

(ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

(88) 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:

(iii) that it is in the public interest that the order of stay be granted.

(89) This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through *the Constitution*."

26. The principles applicable to the granting of conservatory orders have also been discussed by various Courts. In Petition E408 of 2020 Okiya Omtatah Okoiti V Judicial Service Commission; Philomena Mbete Mwilu & Another (Interested Parties) [2021] eKLR this collated the principles as established by various decisions in the following fashion -

23. The locus classicus is the Supreme Court in Civil Application No. 5 of 2014 Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others (2014) eKLR where at paragraph 86 stated the Court stated as follows: -

(86) ..... 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 courses.

24. In Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others Nairobi High Court Constitutional Petition No.154 of 2016 (2016) eKLR after going through several decisions, the Court rightly so, summarized three main principles for consideration on whether to grant conservatory orders as follows: -

(a) An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.

(b) Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and

(c) The public interest must be considered before grant of a conservatory order.

25. There is also the need to ascertain whether the conservatory order sought will delay the early determination of the dispute. (See Nairobi High Court Constitutional Petition No. E243 of 2020 Kenya Tea Development Agency Holdings Limited & 55 Others vs. The Cabinet Secretary Ministry of Agriculture, Livestock, Fisheries & Co-operatives & 2 Others and Kenya Small Tea Holders Growers Association (Kestega) (Interested Party) (unreported).

27. In Board of Management of Uhuru Secondary School Vs. City County Director of Education & 2 Others [2015] eKLR, the Court summarized the principles for grant of conservatory orders as: -

(i) The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of conservatory orders, he is likely to suffer prejudice.

(ii) The second principle is whether the grant or denial of conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.

(iii) Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.

(i) Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.

28. A Court, therefore, dealing with an application for conservatory orders must maintain the delicate balance of ensuring that it does not delve into issues that are in the realm of the main Petition. In this discourse, this court will, therefore, restrain itself from dealing with such issues.

29. The above principles are, however, not exhaustive. Depending on the nature of the matter under consideration, there may be other parameters that a Court ought to look into. Such may include the effect of the orders on the determination of the case, whether there is imminent danger to infringement of the human rights and fundamental freedoms under the Bill of Rights, the applicability of the doctrine of presumption of constitutionality of statutes, whether the Applicant is guilty of laches, the doctrine of proportionality, among many others.

Prima facie case.

30. A prima facie case was defined in Mrao Vs. First American Bank of Kenya Limited & 2 Others (2003) KLR 125 to mean: -

> .... In a civil application it includes but is not confined to a 'genuine and arguable case'. It is a case in which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.

31. The Court of Appeal in Nairobi Civil Appeal No. 44 of 2014 Naftali Ruthi Kinyua vs. Patrick Thuita Gachure & Another (2015) eKLR while dealing with what a prima facie case is, made reference to Lord Diplock in American Cyanamid vs. Ethicon Limited (1975) AC 396, when the Judge stated thus: -

> If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities, that is the end of any claim to interlocutory relief.

32. What constitutes a prima-facie case was further dealt with by the Court of Appeal in Mirugi Kariuki -vs- Attorney General Civil Appeal No. 70 of 1991 (1990-1994) EA 156, (1992) KLR 8. The Court, in an appeal against refusal to grant leave to institute judicial review proceedings by the High Court, stated as follows: -

> It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the nature of his complaint. If he fails to show..... that there has been a failure of public duty, this court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables this court

> to prevent abuse by busy-bodies, cranks, and other mischief-makers... In this appeal, the issue is whether the applicant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of this Act was brought into question. Without a rebuttal to these allegations, this appellant certainly disclosed a prima-facie case. For that, he should have been granted leave to apply for the orders sought. (emphasis added).

33. In Re Bivac International SA (Bureau Veritas) (2005) 2 EA 43, the Court while expounding on what a prima-facie case or arguable case is, stated that such a decision is not arrived at by tossing a coin or waving a magic hand or raising a green flag, but instead a Court must undertake an intellectual exercise and consider without making any findings, the scope of the remedy sought, the grounds and the possible principles of law involved.

34. In a nutshell, therefore, in determining whether a matter discloses a prima facie case, a Court must look at the case as a whole. It must weigh, albeit preliminarily, the pleadings, the factual basis, the respective parties' positions, the remedies sought, and the law. In so doing, a Constitutional Court must be guided by Articles 22 (1) and 258(1) of *the Constitution* which provisions are on the right to institute Court proceedings whenever a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened or contravened, or is threatened with contravention.

35. The Petitioner's contention rested on the lack of public participation.

36. The processes towards the transfer of Narok West sub-county headquarters from Lemek to Ngo's ani were questioned. Such includes whether there was adequate public participation and the legal validity of the Gazettement.

37. The Petitioners vehemently argued that the transfer of Narok West sub-county headquarters from Lemek to Ngo'suani would infringe their constitutional rights.

38. The 2nd Respondent's position is that the Petitioners have not demonstrated how they were not involved in the process of establishing the improved service delivery coordination units and that it would be against the public interest to suspend the gazette notice in its entirety simply because the petitioners have an issue with just one part of it.

39. This Court has carefully weighed the rival positions.

40. The issues raised in the Petition cannot, therefore, be wished away. They are serious constitutional issues worth consideration. It is on that background that this Court finds that the Petition raises a prima facie case in the circumstances of this case.

Irreparable damage/suffering prejudice

41. The second hurdle to be cleared by an applicant seeking conservatory orders is the need to prove that the substratum of the petition will be rendered nugatory if orders are not granted.

42. Put differently, an Applicant must show, albeit on the face of it, that if not granted conservatory orders, the objective of the Petition to forestall the continued or threatened violation of the rights and fundamental freedoms or *the Constitution* will irredeemably be lost and there would be no need to further pursue to main Petition.

43. The petitioners/applicants submitted that they will be prejudiced as the action by the respondents will negatively impact their socio-economic prosperity as residents of Lemek.

44. The 2nd Respondent argued that the granting of the conservatory orders would impact the constitutional mandate of the 1st Respondent.

45. This court has carefully considered this aspect of the dispute. One of the parties, concededly, stands to suffer prejudice, either way, this Court decides on this issue.

46. Given the impact of the matter on the petitioners and the residents of the said former Narok West sub-county headquarters there is every justification for an expeditious determination of this matter.

47. Given the foregoing state of affairs and for this Court to conclusively deal with the matter, the Court will have to interrogate the issues on the constitutionality and legality of the impugned gazette notice and whether there was public participation. Such issues cannot be subject to an interlocutory application but of the main hearing of the Petition. (See the Court of Appeal in Civil Application Nai. 31 of 2016 Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 others [2016] eKLR).

48. This Court is, therefore, persuaded that unless the application is allowed, the Petitioner stands to suffer real prejudice.

49. As to whether the Petition will be rendered otiose in the absence of the orders sought, this Court takes the contrary position. The issues raised in the Petition go beyond the interlocutory application. In the main, the Petition seeks to declare several actions of the Respondents unconstitutional among other prayers.

50. It is, now, the finding of this Court that the Petition survives even in the absence of the orders sought in the application.

Public Interest:

51. 'Public interest' is defined by the Black's Law Dictionary 10th Edition at page 1425 as: -

> The general welfare of a populace considered as warranting recognition and protection. Something in which the public as a whole has stake especially in something that justifies government regulation.

52. *The Constitution* and the laws govern the people. As such, *the Constitution* remains supreme and the laws are always presumed to be constitutional until the contrary is proved. In a matter, therefore, where the constitutionality of a statute is impugned or an issue arises as to whether *the Constitution* is contravened, Courts must weigh, with care and at a preliminary stage, the alleged breach against the provisions of *the Constitution* and the doctrine of presumption of constitutionality and legality of statutes.

53. It is in the public interest that the people have a say in the choice of their sub-county headquarters.

54. In Kizito Mark Ngaywa v. Minister of State for Internal Security and Provincial Administration & Another [2011] eKLR, the High Court (Mohamed, J (as he then was) had the following to say on the issue: -

> I have considered the application for adjournment and that for temporary suspension of the regulations and the submissions by Counsel. When considering the matter, I recalled my decision in Petition No. 669 of 2009, Mombasa Bishop Joseph Kimani & Others – v- Attorney General, Committee of Experts and Another which I delivered on 6-10-2010. In the said case I was guided by the decisions of the Constitutional Court in Tanzania in

Ndyanabo –v- Attorney General (2001) 2 EA 485 in which the said court presided over by the Hon. Chief Justice Samatta stated as follows: -

Thirdly; until the contrary is proved, a legislation is presumed to be Constitutional. It is a sound privilege of Constitutional construction that if possible, a legislation should receive such a construction as will make it operative and not inoperative.

Fourthly, since, as stated, a short while ago, there is a presumption of Constitutionality of legislation, the onus is upon those who challenge the Constitutionality of the legislation, they have to rebut the presumption. Fifthly where those supporting a restriction on a fundamental right rely on a claw back or exclusion clause in doing so, the onus is on them, they have to justify the restriction."

I am still persuaded by the above-mentioned principles of Constitutional interpretation. In the Bishop Joseph Kimani case, the court observed as follows: -

It is a very serious legal and Constitutional step to suspend the operation of statutes and statutory provisions. The courts must wade with care, prudence, and judicious wisdom. For the High Court to grant interim orders in this regard, I think one must at the interlocutory stay actually show that the operation of the legislative provisions are a danger to life and limb at that very moment.

It is my view that the principle of presumption of Constitutionality of Legislation in imperative for any state that believes in democracy, the separation of powers and the Rule of Law in general. Further, the courts to be able to suspend legislation during peace times where there is no national disaster or war, would in my view be interfering with the independence and supremacy of Parliament in its Constitutional duty of legislating law.

55. The applicability of the doctrine of constitutionality of a statute was further dealt with by the Court of Appeal alongside the aspect of public interest. That was in Attorney General & another v Coalition for Reform and Democracy & 7 others [2015] eKLR.

56. Based on the foregoing, this Court finds that public interest tilts in favour of the respondents. It is in the public interest that the impugned notice should not be suspended pending the outcome of the Petition.

Conclusion and orders

57. The above analysis yields that the Petitioners have not successfully laid a basis for the grant of the orders sought in the application.

58. That being the case, the application is not successful. However, given the nature of the Petition herein, there is a need for appropriate directions and expeditious disposal of this matter.

59. In the end, the following orders are hereby issued: -

    a. The Notice of Motion dated 21/02/2024 is hereby disallowed.

    b. The Petition to be heard by way of reliance on the pleadings, affidavit evidence, and written submissions.

    c. The Respondents shall within 14 days hereof file and serve responses to the Petition, if not yet.

    d. The Petitioner shall, thereafter, and within 14 days of service file any supplementary responses, if need be, together with written submissions on the Petition.

e. The Respondents shall file and serve their respective written submissions within 14 days of service.

f. Further directions to issue on a date suitable to the Court and the parties.

60. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 9TH DAY OF APRIL, 2025.

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CHARLES KARIUKI

JUDGE