Aden & 2 others v Ministry of Lands, Public Works, Housing & Urban Development & 3 others (Constitutional Petition E001 of 2025) [2025] KEHC 6103 (KLR) (14 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6103 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CONSTITUTIONAL PETITION E001 OF 2025

JN ONYIEGO, J

MAY 14, 2025

IN THE MATTER OF CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES 27(1) & (2), 42,43 & 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES 10,& 69 OF THE CONSTITUTION OF KENYA

BETWEEN

ABDIWELI NOOR ADEN ..... 1ST PETITIONER

SIYAT ALI NOOR ..... 2ND PETITIONER

AHMED HASSAN MUHUMED ..... 3RD PETITIONER

AND

MINISTRY OF LANDS, PUBLIC WORKS, HOUSING & URBAN DEVELOPMENT ..... 1ST RESPONDENT

STATE DEPARTMENT OF HOUSING & URBAN DEVELOPMENT .... 2ND RESPONDENT

THE COUNTY GOVERNMENT OF GARISSA ..... 3RD RESPONDENT

THE HON ATTORNEY GENERAL ..... 4TH RESPONDENT

RULING

1. Before this court is the applicant's/petitioner's petition filed contemporaneously with a notice of motion both dated 12.02. 2025.The petition sought for the orders that:

    a. A declaration that the respondents discriminated against the residents of Bura Municipality by excluding them from benefitting from the Second Kenya Urban Support Program.

b. A declaration that the Bura Municipality is an urban area hosting refugees and therefore a proper beneficiary of funding under the Window for Host Communities and Refugees component of the Second Kenya Urban Support Program.

c. An order directing the respondents to include Bura Municipality as one of the urban areas to participate and benefit from the Window for Host Communities and Refugees component of the Second Kenya Urban Support Program.

d. Costs of this petition.

2. As already enumerated, the petitioner also filed a notice of motion seeking the following prayers:

i. Spent.

ii. That a conservatory order do issue restraining the respondents from disbursing approved funds under component 3 (Window for Host Communities and Refugees) of the Second Kenya Urban Support Program and/or taking any further steps towards implementation of the program pending the hearing and determination of this application and the petition herein.

iii. That a conservatory order do issue restraining the respondents from taking any further steps to implement the Second Kenya Urban Support Program including disbursement of funds to all municipalities pending hearing and determination of this application and the petition herein.

iv. That the cost of this application be provided for.

3. The application is grounded on the facts set out on the face of it and further, supported by the affidavit of Abdiweli Noor Aden, the 1st applicant/ petitioner herein sworn on 12.02.2025 on his behalf and that of the 2nd and 3rd petitioners/applicants.

4. It was deposed that the Second Kenya Urban Support Program, hereinafter, KUSP – 2 is a public funded initiative under the department of Housing and Urban Development currently under the Ministry of Lands, Physical Planning Housing and Urban Development. That the project has a national component, a sub – national component and a component for host communities and refugees. It was averred that the component of the KUSP – 2 for host communities is funded by a grant under the Window for Host Communities and Refugees (WHR) as component 3 of the program. That under component 3, the beneficiaries are strictly counties and municipalities that host refugees in Kenya being Garissa County and Turkana County.

5. It is the applicant's /petitioner's case that Garissa County refugees are hosted under what is known as the Daadab Refugee complex consisting of three main camps namely; Dagahaley, Ifo and Hagadera. That Dagahaley and Ifo are located in Daadab Municipality in Daadab Constituency while Hagadera is located in Bura Municipality within Fafi constituency. It was contented that under component 3 of the project, urban boards (municipal boards) are to receive funds for investment in critical infrastructure and services such as water supply, solid waste management, urban roads upgrading and reforestation.

6. That in preparing component 3 of the project for implementation, the respondents did not take into account that the Daadab refugee complex extends to Bura Municipality which hosts Hagadera refugee camp, the largest refugee camp by population as per the United Nations High Commission for Refugees data.

7. That in the documents published by the respondents, Bura Municipality is excluded from the list of urban areas eligible to benefit under the KUSP – 2. It was alleged that the respondents did not give any explanation for the exclusion of Bura Municipality from the program while the other two refugee

hosting municipalities were included. This court was therefore urged to intervene and ensure fairness by directing that all urban areas hosting refugees be treated equally under the KUSP – 2. It was further urged that noting that the Window for Refugees and Host Communities funds are already due for disbursement, it was mete that this court issue conservatory orders to preserve the funds until the issues raised in the petition herein are dealt with to a logical conclusion.

8. Mr. Charles Hinga, the Principal Secretary, State Department for Housing and Urban Development on behalf of the 1st ,2nd and 4th respondent swore an affidavit on 04.03.2025 opposing the suit. He deponed that the State Department for Housing and Urban Development is responsible for providing policy direction and coordination of all matters related to housing and urban planning and development. That the Second Kenya Urban Program (KUSP 2) was effected on 14.05.2024 as a national government program funded by the world bank and domiciled at the state Department for Housing and Urban Development.

9. It was averred that the aim of the project is to improve service delivery and resilience of urban infrastructure and services. That to facilitate the delivery of the program, the national government and the respective county governments signed an Intergovernmental Participation Agreement (IPA) that outlines the framework for the engagement. That in line with the *Urban Areas and Cities Act*, (UACA), Cap 275, the County government of Garissa granted municipal status to Dadaab on 26.06.2023 and Bura Municipality on 20.10.2023. It was urged that Dadaab Municipality hosts Dagahaley, Ifo (1 and 2) Refugee camps whereas Bura Municipality hosts Hagadera Refugee Camp.

10. That in anticipation of having 2 Window for Host communities and Refugees (WHR) municipalities in Garissa County, Hagadera was left out of Dadaab Municipality but included in Bura Municipality. It was stated that the implementation of the proposed program is subject to donor conditions which must be adhered to in order to secure funding and ensure sustainability. That any deviation from these conditions may jeopardize the entire initiative. It was averred that in line with the roll out of KUSP 2 and more so in respect to the present suit, there is no discrimination, nor inequality, as alleged. That the suit is premature as consultations are ongoing for inclusion of Hagadera camp within the boundary of Dadaab Municipality.

11. Further, that the petitioner/applicant did not demonstrate any immediate or irreparable harm warranting the interim reliefs sought. To that end, this court was urged to dismiss the application with costs to the respondents.

12. The 3rd respondent entered appearance and consequently filed a preliminary objection dated 03.03.2025 on grounds as follows:

    i. That the Honourable Court lacks jurisdiction to hear and determine the application and proceedings herein by dint of the express provisions of Item V of the impugned Second Kenya Urban Support Program Project appraisal document Report No. PAD5054 on the grievance redress mechanism annexed to the applicants' supporting affidavit as exhibit AMB – 03 which under page 44 stipulates that:

    V GRIEVANCE REDRESS SERVICE

    > "100. Grievance Redress. Communities and individuals who believe that they are adversely affected as a result of a Bank supported P and R operation, as defined by the applicable policy and procedures, may submit complaints to the existing program grievance redress mechanism or the World Bank's Grievance Redress Service (GRS).

ii. That Section 9(2) of the Fair Administrative Actions Act limits this Honourable Court's jurisdiction to review an administrative action or decision under the *Fair Administrative Action Act* unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

iii. That the applicants have failed and/or refused to comply with and/or exhaust the grievance redress mechanism stipulated under the impugned program thus the court lacks jurisdiction to hear the matter as the same offends section 9 (2) of the Fair Administrative Actions Act.

iv. That the instant application and/or proceedings are unripe and premature as the applicants have failed to exhaust the alternative means of dispute resolution under the impugned program document."

13. Reasons wherefore, the 2nd respondent urged that the applicant's application dated 04.02.2025 and the entire proceedings herein be struck out with costs.

14. In the same breadth, the 3rd respondent filed a replying affidavit sworn on 03.03.2025 by Mohammud Mursal, the county secretary of the County Government of Garissa deposing that, this court is bereft of the requisite jurisdiction to hear and determine the suit herein. That the KUSP is a series of initiatives aimed at enhancing urban development. That under the KUSP 1, the same was anchored on Kenya Urban Program (2017 – 2022) focused on supporting urban development by strengthening institutional capacities and improving service delivery in urban areas. The second KUSP (2022 – 2026) thus builds on KUSP 1 and the same is a world bank financed program with the goal of strengthening the capacities of urban institutions to inter alia improve the delivery and resilience of urban infrastructure and services and enhance the private sector engagement in urban planning.

15. That under KUSP 2 program, there is a component known as window for host communities and refugees (WHR) which is a USD 50 million grant aimed at supporting the elevation of Kakuma and Daadab to a municipality, thus strengthening the economic environment in refugee hosting communities to drive growth, support economic development by addressing key infrastructure and social services needs in hosting counties and improving connectivity.

16. That it is against the above that the governor, County of Garissa conferred on Daadab, the status of a municipality and granted it a charter under the *Urban Areas and Cities Act* on 26.06.2023. It was contented that the program was conceptualized and fully funded by the world bank through a grant. That the applicants are seeking to challenge the program which the 2nd respondent has no role in its preparation but was only asked to implement. It was urged that world bank being the benefactor of the grant, in its wisdom left out refugee camps hosted by Fafi constituency which the 2nd respondent cannot understand nor has locus to question. It was reiterated that the Kenya Urban support program is being implemented in stages thus there is a possibility that camps hosted by Fafi constituency may benefit from the next phase.

17. That the project has been rolled out and is currently being implemented and therefore, these proceedings have been overtaken by events. To that end, it was urged that this suit is premature and an abuse of the court process and therefore, ought to be dismissed.

18. The court directed that the preliminary objection and the application be canvassed together by way of written submissions.

19. The petitioners/applicants filed submissions dated 17.03.2025 urging that the 3rd respondent's preliminary objection is based on the doctrine of internal/alternative means of dispute resolution. Reliance was placed on the case of Catherine Mwihaki Ngambi vs International Leadership University

[2021] eKLR where it was held that the court is obliged to look at whether the dispute resolution mechanism relied on by the respondent is competent in the circumstances of the case and in the interest of justice.

20. That a simple reading of the said paragraph on grievance redress referred by the 3rd respondent, only relates to complaints from communities who may be harmed by the implementation of a world bank supported program for results operation. Counsel proceeded that it could be inferred that complaints on exclusion of deserving communities from a particular program is outside the scope of the grievance redress mechanism of the world bank. That the nature of the complaints envisioned therein relate to adverse social – economic effects and adverse effects on the environment as a result of the implementation of the world bank supported program. It was contented that some of the complaints offered on the information brochure on the grievance redress service website include: involuntary resettlement, violation of indigenous people's rights, environmental degradation and occupational health and safety concerns. To that end, it was argued that arbitrary exclusion of a deserving community from the program that it qualifies to be part of is outside the scope of the kind of complaints envisioned under the grievance redress service.

21. It was further contended that the focus of the petition is on the infringement of the right of the petitioners and the residents of Bura Municipality to equal treatment, equal benefit and non-discrimination in the design and implementation of a public funded development program; hence not on the supposed harm that the petitioners have suffered as a result of the implementation of the program which is what is sought to be cured by the grievance redress mechanism provided for in the program. To that end, this court was urged to dismiss the preliminary objection with costs.

22. On whether conservatory orders ought to be issued, the petitioners argued that on the first leg, consideration for grant of conservatory orders were summarized by the High Court in the case of Wilson Kaberia Nkunja vs The Magistrate and Judges Vetting Board and Others Nairobi High Court Constitutional Petition No. 154 of 2016 (2016) eKLR where the court held that 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 real danger that he will suffer prejudice as a result of the violation or threatened violation of *the constitution*; whether if a conservatory order is not granted, the petition alleging violation of, or threat of violation of rights will be rendered nugatory; and the public interest must be considered before grant of a conservatory order.

23. That in the instant case, the applicant demonstrated a prima facie case with a probability of success. That it is not contested that the window for Host Communities and Refugees component is meant to improve critical infrastructure in refugee hosting urban centres. It was also stated that there are two refuge hosting municipalities within Garissa County being Dadaab and Bura Municipalities. That noting the program as designed only benefits Dadaab Municipality and not Bura Municipality and no reason has been given for the indifferent treatment, a prima facie case thus has been established.

24. On the second element, counsel contended that the applicant must prove whether if a conservatory order is not granted, the petition would be rendered nugatory. That the 1st ,2nd and 4th respondents conceded that the grant has been approved for disbursement while the assessment for the Urban Development grant is still ongoing. It was urged that if the program implementation continues, the public funds will be expended and possibly exhausted by the time the petition is heard and determined thus rendering the petition an academic exercise.

25. On public interest, it was urged that the project in question is a public project aimed at improving the livelihood of citizens and therefore, must be implemented in accordance to the supreme law of the land. To that extent, this court was urged to allow the prayers sought.

26. The 1st ,2nd and 3rd respondents filed submissions dated 28.03.2025 in respect to the petitioners/ applicants notice of motion dated 12.02.2025 urging that the only issue for determination is whether the applicants have met the threshold for grant of conservatory orders. That in the cases of Wilson Kaberia Nkunja vs The Magistrate and Judges Vetting Board and Others Nairobi High Court Constitutional Petition (supra), and Usikimye CBO & 4 Others vs Chebochok & 4 Others; Law Society of Kenya & 9 Others (Interested Parties) (Constitutional Petition E006 of 2024) [2024] KEHC 10121 (KLR), (15.08.2024) Ruling, the principles for grant of conservatory orders were stated as follows: an applicant must demonstrate a prima facie case capable of success, that the alleged violations of the rights will render the petition nugatory and that the public interest must be considered before the grant of the said orders.

27. That in the current case, it was not demonstrated whatsoever that any of the applicants'/petitioners fundamental rights were at stake and needed this court's intervention. In the same breadth, it was submitted that the applicants did not demonstrate how the disbursements of the amount already approved would render the petition nugatory. That pursuant to the conditions by the donor, it is only Dadaab Municipality from Garissa County that has qualified for the grant under the Window for Host and Communities Refugees.

28. Further, it was contended that it is only the donor, being the world bank that determines or qualifies eligibility for the KUSP 2 program. It was further urged that the orders sought herein are final in nature as they seek to stop the implementation of the KUSP 2. To that end, support was drawn from the case of Muslim for Human Rights (Milimani) & 2 Others vs The Attorney General & 2 Others (2011) eKLR where it was held that a court must be careful for it not to reach a final conclusion and or findings at the interlocutory stage.

29. That the orders sought may bar the credits from the world bank as the specific terms and conditions set must be adhered to, failure to which the same may jeopardize and even paralyze the entire program. As a consequence of the foregoing, the same would end up affecting other municipalities that are set to benefit from the program and are not parties to this case. To that end, this court was urged not to allow the orders sought as the same would affect the right to development of the 79 municipalities already qualified in the program. That allowing the program to continue would serve a greater public interest as opposed to stopping it.

30. The 3rd respondent via submissions dated 19.03.2025 urged that section 9(2) of the *Fair Administrative Action Act* limits this court's jurisdiction to review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. That in reference to the suit herein, the impugned program appraisal document which is a World Bank prepared document has a provision for grievances by communities and individuals who believe that they are adversely affected by the project. That the applicants failed to exhaust the grievance/redress mechanism as readily available in the impugned document governing the project.

31. The court was referred to the case of John Musikali vs speaker county of Bungoma & 4 Others [2015] eKLR, where the court observed that a preliminary objection in law should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised, the preliminary objection should have the potential of disposing of the suit at that point without the need to go for trial'.

32. That the applicants are aggrieved by the implementation of KUSP 2 component on window for Hosting Communities and refugees' component which is fully funded by the world bank on the premise that the program appraisal document No. PAD 5054 dated 24.05.2023 is discriminatory as it makes provision for Dadaab and Kakuma Refugee camps only to the exclusion of Hagadera camp

situated in Bura – Fafi Municipality. That the impugned program appraisal document which is a world bank prepared document has a provision for grievance redress by communities and individuals who believe that they are adversely affected by a world bank supported project.

33. Counsel was of the view that the applicants did not exhaust the available remedies before moving this court. That the same was contra the doctrine of exhaustion as was held in the case of Speaker of National Assembly vs Karume (1992) KLR 21 where the court stated that it is imperative that where a dispute resolution mechanism exists outside the courts, the same be exhausted before the jurisdiction of the court is invoked. Additionally, that the only way out of the mandatory application of section 9 is a provision under section 9(4) which provides that: Notwithstanding subsection (3), the High Court or a subordinate Court may in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interests of justice.

34. That in the instant case, the applicants did not demonstrate any existence of any exceptional circumstances to warrant exemption and neither did the court exempt the applicants from the obligation. Equally, the applicants did not make any application to the court for it to invoke its discretion. Reliance to that end was placed on the Court of Appeal decision of Wajir Wasco Limited alias Wajir Water & Sewerage Company & Another vs Mohamed & 2 Others, Civil Appeal No. E396 of 2023) [2024] KECA 937 (KLR) where the court stated that ...the respondents never applied for exemption under section 9(2) of the *Fair Administrative Action Act*. We say no more. The import of their failure is that the suit before the trial court was caught up by the doctrine of exhaustion.

35. In the end, this court was urged to find that the applicants invoked this Honourable Court's jurisdiction prematurely as they failed and/or ignored to exhaust the grievance/redress mechanism stipulated under the impugned program appraisal document which is the subject of litigation of this matter.

36. On whether the petitioners/applicants have met the threshold for grant of the conservatory orders sought, it was urged that no prima facie case was established as there exists an alternative avenue through which the petitioners'/applicants grievance could be addressed. Additionally, that the alleged discrimination was not established as the 3rd respondent's role is simply to implement the project as funded by the world bank. Further, that the sought orders have an implication of interfering with the implementation of the program in other areas like Turkana County, which is not a party to the suit herein.

37. On whether the suit would be rendered nugatory, it was urged that the petitioners/applicants having bypassed a mandatory and an alternative dispute resolution mechanism which is properly seized of the program, the issues raised herein thus are premature. On the angle of whether the orders sought herein ensures public interest, it was urged that a blanket restraint on the respondents from taking a further step to implement KUSP 2 is more prejudicial as the same would lead to condemning parties unheard. To that end, it was urged that the petitioners/applicants were undeserving of the orders sought.

38. This court has considered the preliminary objection herein and the application seeking a conservatory order. I have also considered rival submissions by both parties. Issues that a rise for determination are; firstly, whether the objectors have met the threshold for this court to uphold the preliminary objection; Secondly, whether the applicants have met the threshold for grant of conservatory orders.

39. In the celebrated case of Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd. [1969] E.A. 696, Law, JA in that case said (p.700) as follows:

> " I agree that the application for the suit to be dismissed for want of prosecution should have taken the form of a motion, and not that of a 'preliminary objection' which it was not. So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."
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> And to the same effect Newbold, P stated (p.701):
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> "The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop".

40. In the same breath, the court in the caseOraro v Mbaja [2005] KEHC 3182 (KLR) had this to say;

> " As already remarked, anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence ..."

41. In the instant case, the respondents have challenged this court's lack of jurisdiction on account that the applicant did not exhaust the dispute resolution mechanism provided under item v of the impugned second Kenya urban support program project appraisal document No. pad 5054 which provides that communities and individuals who believe that they are adversely affected, as a result of a bank supported P for R operation, as defined by the applicable policy and procedures, may submit complaints to the existing program grievance redress mechanism or the world bank's redress service.

42. Indeed, superior courts have time and again held that when a court satisfies itself that it has no jurisdiction in adjudicating over a matter, it should down its tools. See.Owners of the Motor Vehicle Vessel 'Lilian S' vs Caltex Oil [Kenya] Ltd [1989] KLR 1 where the court held that jurisdiction is everything and without it, it cannot move any further step.

43. According to the respondents, the court should down its tools. On the other hand, the applicants are of the view that, the dispute resolution referred to does not concern the subject before the court. According to Mr Ongoya counsel for the applicants, the grievances referred to internal dispute resolution only relate to effects that the implementation of the project may occasion to the community interalia environmental degradation.

44. Whereas Section 9(2) of the *fair administrative Action Act* provides for exhaustion of internal disputes resolution mechanism, the same is dependent on the law or provision providing for such remedy. In the instant case, the grievances provided for dispute resolution are those projects undertaken that have adverse effects to the host community or individual/s.

45. It is my understanding that the grievances in question have nothing to do with resource allocation which is the crux of the matter herein. The clause in question only recognizes grievances arising out of the side effects of the project and not resource distribution. To that extent, I am in agreement with Mr. Ongoya that the provision for redress of grievances is not applicable in the circumstances of this case.

46. Besides the above holding, the provision providing for redress of grievances is not couched in mandatory terms. it uses the word 'may' which means it is optional. If it was intended to be mandatory, then the drafters should have expressed themselves as such. Being optional, the applicants were left with the option of approaching the court or the existing redress mechanism. On account of that ground again, the preliminary objection fails. For those reasons stated, it is my finding that this court is properly seized of jurisdiction.

47. Regarding the grant of conservatory orders, these are discretionary in nature. The applicants have expressed themselves that they have established the salient elements for grant of conservatory orders interalia; they have established a primafacie case; the petition is likely to be rendered nugatory and that this is a matter of public interest. To the contrary, the respondents have argued that there is no primafacie case as the funds involved are from world bank who reserves the sole discretion to determine on how their funds should be spent. Secondly, it is their case that public interest demands that the project should continue.

48. 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)e KLR 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".

49. 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).

50. 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.

51. 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, the Court should consider the aspect of 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.

52. 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..."

53. On the question whether the applicants have established a primafacie case, one would have to consider the fact that Hagadera is a refugee camp which falls under Bura municipality hence qualifies to benefit under the criterio set out by the respondent a fact that is not disputed. On that ground alone, a primafacie case is established.

54. Regarding the petition being rendered nugatory, there is no doubt that in the absence of a conservatory order, the project will be fully implemented before the petition is heard and determined and if successful, there will be nothing left to benefit from.

55. Touching on the aspect of public interest, the same must be balanced as both sides have an equal interest. To that extent, the status quo would serve both public interest and nobody would suffer prejudice by halting the project briefly and then expedite the process to ensure that each party has been given the opportunity to be heard.

56. Having held as above, it is my conviction and finding that the application herein is merited and the interim conservatory order already in place shall remain in force until the petition is heard and determined.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 14TH DAY OF MAY 2025

J. N. ONYIEGO

JUDGE