



REPUBLIC OF KENYA



KENYA LAW
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**Atyang & 3 others v Cabinet Secretary, Ministry of Treasury and Economic Planning & 3 others
(Constitutional Petition E016 of 2025) [2025] KEHC 5990 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5990 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CONSTITUTIONAL PETITION E016 OF 2025**

A MABEYA, J

MAY 9, 2025

BETWEEN

**CHARLES ATIANG ATYANG 1ST PETITIONER
OLGAR AOKO OTIENO 2ND PETITIONER
DUNCAN JAMES ONYANGO 3RD PETITIONER
EDWARD ONYANGO OGWANG 4TH PETITIONER**

AND

**CABINET SECRETARY, MINISTRY OF TREASURY AND ECONOMIC
PLANNING 1ST RESPONDENT
PRINCIPAL SECRETARY, TREASURY AND ECONOMIC PLANNING 2ND
RESPONDENT
PRINCIPAL SECRETARY, STATE DEPARTMENT FOR AGRICULTURE 3RD
RESPONDENT
THE OFFICE OF THE ATTORNEY GENERAL 4TH RESPONDENT**

RULING

1. This is a ruling on the Motion dated 6/5/2025 brought under various provisions of *the Constitution* and the *Civil Procedure Act*. It sought conservatory orders to stop, stay and halt the tendering process for some tenders advertised by the respondents. It was alleged that the tender was for the leasing of certain public Sugar factories in the Sugar belt region.
2. The grounds were set out in the body of the Motion and the Supporting affidavit of Charles Atiang Atyang sworn on 6/5/2025. These were that the respondents are public entities mandated to oversee public sectors including Agriculture. That they had advertised in their website International



Tender No. MOAZD/5DA/IT/002/2024/2025 and International Tender No. MOAZD/5DA/IT/004/2024/2025, respectively for the leasing of Chemelil and Muhoroni Sugar Companies.

3. That the process was shrouded in secrecy, non-material disclosure and clandestine machinations. That a 17-member Leasing Transition Committee had been appointed to oversee and facilitate this process. That there were no consultations with County representatives. That the factories being public/state owned, the public ought to have been involved in decision making. There was no adequate or any public participation.
4. The applicants alleged the violation of various provisions of *the Constitution*, in particular, Articles 10, 201 and 227 as well as *Public Procurement and Asset Disposal Act*, 2015. That the Motion was meant to stop the respondents from breaching the right to public participation, legitimate expectation and fair administrative action.
5. The applicants urged that they would suffer irreparable loss and damage if the orders sought are not granted.
6. The Motion was opposed by the respondents vide Grounds of Opposition dated 7/5/2025 and the Replying Affidavit of Dr. Kipronoh Ronoh sworn on 8/5/2025. It was contended that the Petition had been filed prematurely as the petitioner had not exhausted the remedies set out in the Public Private Partnership (PPP) Act. That the issue of public participation had been determined in Nairobi Petition No. E065 of 2024. That there was a similar matter pending in Kisumu ELRC Petition No. 6 of 2025.
7. The respondents further contended that because of the problems bedeviling the Sugar sector in the country, a Task Force was formed way back in 2018 to suggest remedies to the problem. That there were consultative meetings which involved all stakeholders culminating in a Report that was approved by Cabinet leading to a Memorandum of Action. Plan for the revival and commercialization of the Sugar Companies. That the National Assembly was likewise roped in and it called for the views of stakeholders. That the Lease had already been signed and the application was overtaken by events. They urged that the Motion be dismissed.
8. I have considered the rival contestations. I have also considered the oral submissions of the Learned Counsels. From the onset, the Court frowns on the fact that, the applicants have waited until the 11th hour to come to court. The tenders were advertised in March, 2025 yet the Motion is being brought on 6/5/2025, 3 days from the date the Leases are alleged to be signed. Why the urgency now? Be that as it may, the Court decided nevertheless to give the parties a hearing for the ends of justice.
9. This is an application for conservatory orders. To stay or stop the leasing process for certain public sugar factories pending the hearing and determination of the Petition. Like in all interlocutory injunctions, the applicant is supposed to satisfy the principles set out in *Giella vs Cassman Brown case (1973) EA*. These are; establish a prima facie case with a probability of success, that if no injunction is granted the applicant will suffer irreparable loss and damage and that if in doubt, the Court will determine the matter on a balance of convenience.
10. Before delving into the Motion, the respondents raised one issue in which if they succeed, this Court has no other choice but to down its tools. In paragraph 21 of the Replying Affidavit, Dr. Kipronoh Ronoh swore: -

“21. THAT from the foregoing, it is clear that the petitioners are fully aware that the issues complained of and in particular the alleged signing of the tender documents and related activities have long been completed and hence the orders sought and particularly interim orders cannot issue as courts cannot



be misled to issue orders in vain. Annexed here to is a bundle of documents supporting my allegations marked “RK1.”

11. I have looked at the entire huge bundle submitted by the respondents. Due to the urgency (less than 24 hours) they were not paginated. I have not been able to see any executed lease or tender document as alleged. I asked Ms. Jumma about the evidence of that allegation. She informed the Court from the bar that the signing of the Leases occurred on 25/4/2025 and that the copy of the Lease could not be exhibited because of the urgent manner in which the application was brought.
12. Firstly, section 107 of the Evidence Act provides that he who alleges must prove. There is no evidence of any Lease having been signed. Obviously, Dr. Kipronoh’s averments were meant to mislead the Court on this. If any Lease had been executed as alleged, nothing would have been easier than to produce a copy in his affidavit. Or was he out to confirm the secrecy as alleged by the petitioners? Why the alleged Lease not exhibited is beyond the comprehension of the Court.
13. The Court is well guided by section 112 of the Evidence Act that: -

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disposing that fact is upon him.”
14. The effect of the foregoing is that a party who has evidence of a fact and fails to produce the same, the Court is entitled to make an inference that had such a party produced the same, it would have been adverse to him. Accordingly, in this case an adverse inference arises that either the alleged Leases do not exist and if they do, they may be irregular. I reject the contention that any Lease has been signed.
15. On prima facie, the petitioners contended that there had been no public participation. That the whole exercise was shrouded in secrecy and therefore breaching the National Principles and values of transparency and accountability. That the farmers own the subject factories through the State. The respondents contended that there had been a public engagement and public participation from way back 2018. That in any event, the issue had been determined by Mwita J in Nairobi Petition No. E065 of 2024 – Martin Nyongesa Barasa vs State Law and Another.
16. Public participation is a very crucial/constitutional imperative in making public policy in this country that no public officer or entity can wish it away. In *Kiambu County Government & 3 Others vs Robert N. Gakuru & Others* (2017) eKLR, the Court of Appeal held: -

“The issue of public participation is of immense significance considering the primacy it has been given in the Supreme Law of this County and in relevant statutes relating to institutions that touch on the lives of the people. Then constitution in Article 10 which binds all stat organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the ideals and aspirations of our democratic nation.”
17. As to what constitutes adequate and effective public participation, a 3 Judge-bench of the High Court in Nairobi Petition No. E473 of 2023 *Aura Joseph Enock vs The Cabinet Secretary Ministry of Health & 11 Others* set out the bare minimum requirements. It held that: -
 - “i) Proper sensitization on the nature of legislation to be enacted or policy to be effected;
 - ii). Adequate notice depending on the circumstances which must however be reasonable;



- iii). Facilitation of the public to ensure that members of the public are able to access the information required in a convenient and practical manner, understand the same, have a meaningful opportunity to attend, contribute and provide their views;
- iv). The views of the public should be considered and where they are to be rejected or declined, reason for such rejection and dismissal should be stated; This will obviate the public participation being a cosmetic or a public relations act;
- v). Public participation should be inclusive and should reflect a fair representation and diversity of the populace to be affected;
- vi). There must be integrity and transparency of the process.”

18. In the said Nairobi Petition No. E065 of 2024, Mwita J considered the issue of public participation on the leasing of the sugar factories. He observed: -

“When an action is challenged for being unconstitutional, the burden is on the State organ or agency responsible to prove otherwise. In this case, the duty fell on the respondents to prove that their action complied with *the constitution* and he law. In this respect, the respondents demonstrated through documentary evidence that there was stakeholders’ engagements and the National Assembly approved leasing of the sugar companies. It is also important to point out here, the challenge in this petition was that the process being undertaken was privatization under the *Privatization Act* and in violation of a subsisting court order. The challenge was not directed at a process under the Public Private Partnership (PPP) Act...”

19. It is clear from the foregoing that Mwita J did not hold that there had been public participation on the leasing of the factories. He only made a finding that there had been public participation on the issue of privatization of sugar factories.

20. The jurisprudence arising from the Apex Court and the Court of Appeal is that public participation is not a cosmetic exercise or one of ticking boxes. There must be demonstration that the same is not only meaningful but reasonable. It is a quest to do away with the hitherto culture of public officers cutting deals in dark rooms or behind closed doors to the detriment of public interest. The days of cutting corners and doing public business in an opaque manner are long gone.

21. In the present case, there is no evidence that after ditching the privatization route, there was any public participation on leasing once the National Assembly approved that new route. There should have been public participation under the *Public Private Partnerships Act*. The existence of Kisumu ELRC Petition No. E006 of 2025 on the same issue does not bar this Court from making a finding on this issue as there was no objection raised under section 6 of the *Civil Procedure Act*. In any event, that case concerns failure to involve the employees on their fate after the Leasing and not the farmers as in this case.

22. The last issue on prima facie case is the doctrine of exhaustion raised by the respondents. Section 75 of the Public Private Partnership (PPP) Act establishes the PPP Petition Committee. The Committee is a tribunal that adjudicates on petitions and complaints submitted by parties during the tendering and project agreement processes related to Public Private Partnership (PPP) projects.

23. Section 75 of the Act provides: -

“ 1 ...



2

3 ...

4. A person who is aggrieved by a decision of the Directory Committee or a contracting authority regarding a tender process or project agreement may lodge a petition to review the decision with the Petition Committee in the prescribed form and after paying the prescribed fee.

...

...

8. A person aggrieved by the decision of the Petition Committee may appeal to the High Court within fourteen days from the date of the Committees' decision."

24. Ms. Jumma urged that by virtue of that provision, this Court was bereft with any jurisdiction to entertain the petition and the motion. That the same were premature. Mr. Echesa on his part submitted that The High Court has original jurisdiction that cannot be hamstrung or limited by statute.

25. The doctrine of exhaustion in this country mandates parties to exhaust available administrative or alternative dispute resolution mechanisms before seeking judicial relief. Its aim is to ensure that parties are diligent in protecting their interests within the existing legal framework outside Court. It not only enhances access to justice by adding a layer in dispute resolution hierarchy but it also seeks to avoid burdening courts with matters that can be resolved through other means.

26. In *Geoffrey Muthiga Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others* (2015) eKLR, the Court of Appeal held: -

"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be a forum of last resort and not first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interests within the mechanisms in place for resolution outside the Courts. The *ex parte* applicants argue that this accords with Article 159 of *the Constitution* which commands courts to encourage alternative means of dispute resolution...

As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

The second principle is that the jurisdiction of Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests of party wishes to advance in a suit must not be ousted. The rationale behind these precepts is that statutory provisions ousting court jurisdiction must be construed restrictively."



27. I have looked at the remedies sought in the Petition. The same are not for enforcement of individual rights and freedoms in the bill of rights. It is about violation of *the Constitution*. While I agree with Mr. Echesa that the High Court's jurisdiction is original, but when a particular procedure is provided for by law, this Court is called upon to ensure that the same is followed as is commanded by Article 159 of Constitution. The petitioners have not showed that following the procedure provided for under Public Private Partnership (PPP) Act was not adequate remedy. They know of this process way back in March, 2025 and they did nothing.
28. In the present case, had the Motion sought the conservatory orders, pending reference to the Petition Committee (and extension of time to do so), then I think this Court would have readily done so for reasons of lack of public participation. However, since that was not sought, and parties are bound by their pleadings, the Court finds that prima facie case has not been established.
29. The prima facie case having failed to be established, I need not consider the rest of the principles in *Giella vs Cassman Brown* (supra). In any event, the petitioners can still be able to pursue the matter in another forum to challenge the actions of the respondents.
30. Accordingly, I find that the application dated 6/5/2025 is without merit and I dismiss the same. This being a public interest litigation, I order that each party bears own costs.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF MAY, 2025.

A. MABEYA, FCI Arb

JUDGE

