



**Hassan & another v Cabinet Secretary Ministry of Interior & Co-ordination & another (Petition E005 of 2025) [2025] KEHC 5898 (KLR) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5898 (KLR)

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

**PETITION E005 OF 2025**

**JN ONYIEGO, J**

**MAY 8, 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**

**MOHAMUD FARAH HASSAN ..... 1<sup>ST</sup> PETITIONER**

**IBRAHIM ABDIKADIR IBRAHIM ..... 2<sup>ND</sup> PETITIONER**

**AND**

**CABINET SECRETARY MINISTRY OF INTERIOR & CO-  
ORDINATION ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**



## RULING

1. Vide a petition dated 28<sup>th</sup> February, 2025 the petitioners sought orders as follows;
  - a. A declaration that the establishment of the new administrative units namely Buna Sub County, Malkagufu division, Luqe location, Luqe Sub location, Harade division, Kulanta sub location and Korondille Sub-county vide Gazette Notice Number 15341 Vol. CXXVI No. 203 of 22<sup>nd</sup> November, 2024 was conducted without any or adequate public participation.
  - b. A declaration that there was no public participation resulting in recommendations for the creation of the impugned administrative units.
  - c. 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.
  - d. A declaration that the boundaries for those units have not been identified and demarcated vis-à-vis existing electoral boundaries.
  - e. An order of certiorari bringing into this court and quashing Gazette Notice Number 15341 Vol. CXXVI No. 203 of 22<sup>nd</sup> November 2024 establishing the impugned administrative units and addresses to all regional commissioners operationalizing the impugned new administrative units namely Buna Sub County, Malkagufu division, Luqe location, Luqe Sub location, Harade division, Kulanta Sub location & Korondille Sub-County.
  - f. Costs of and incidental to this petition.
2. Contemporaneously filed with the petition, is a Notice of Motion of even date the subject of this ruling seeking orders;
  - 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 22<sup>nd</sup> November 2024 that creates the proposed sub-county namely Buna Sub County, Malkagufu division, Luqe location, Luqe sub location, Harade division, Kulanta sub location and Korondille 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 22<sup>nd</sup> November 2024 that creates the proposed sub-county namely Buna Sub County, Malkagufu division, Luqe location, Luqe sub location, Harade division, Kulanta sub location and Korondille 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.
3. The application is based on the particulars set out on the face of it and further amplified by the content contained in the affidavit in support sworn on 28<sup>th</sup> February 2025 by Mohamud Farah Hassan the 1<sup>st</sup> applicant herein on his own behalf and that of his co-petitioner. Principally, the applicant’s case is



- anchored on the claim that the administrative units the subject of this petition were unilaterally created by the 1<sup>st</sup> respondent without consulting residents of the affected areas and that no public participation was conducted before establishing those units through the impugned gazette notice.
4. It was further averred that unless the said gazette notice is revoked, the social economic gains materialized by the presence of sub-county offices in Buna-sub-county shall be clawed back leading to the marginalization of the region thus defeating the objects of devolution as contemplated under Article 174(e-h) of *the Constitution*. That there will be no prejudice if the application is allowed.
  5. In response, the respondents filed 8 grounds of opposition dated 26-03-2025 but which I will summarize as below:
    - a. That the petitioners have not demonstrated real danger so imminent, true and actual and not fictitious so as to deserve immediate redress.
    - b. That the petitioners have not in any way demonstrated that the impugned gazette notice violated *the constitution* and their rights.
    - c. That the issue of lack of public participation can only be canvassed in the main petition and not in an application.
    - d. That there is no proof of prejudice nor irreparable harm likely to be suffered if the sought orders are not granted.
    - e. That the orders sought are final in nature and if granted will prejudice the outcome of the main petition.
    - f. That there is no proof that if the orders are not granted, the petition will be rendered nugatory.
  6. When the matter came up for directions, parties agreed to file submissions to dispose the same.
  7. The petitioners/applicants through the firm of Okello Okoth Advocate LLP filed their submissions dated 7<sup>th</sup> day of March 2025. Learned counsel submitted that the applicants have established a prima facie case in that the impugned gazette notice established the said units without public participation contrary to Article 10 of *the constitution*. To buttress that position, the court was referred to several authorities inter alia; Civil application No. 5 of 2014 Gatirau peter munya vs Dickson Mwenda Kithinji & 2 others(2014)e KLR, David Ndi & others vs Attorney General& others(2021) and Board of Management of Uhuru Secondary School vs City County Director of Education &2 others (2015)e KLR where the court stated that for a conservatory order to issue, the following must be established; the applicant must establish an arguable prima facie case and that if not granted he will most likely suffer prejudice; whether the grant or denial of the order will enhance the constitutional values of a certain right; whether the petition will be rendered nugatory if not granted and; whether it is the public interest that it be granted.
  8. In a nut shell, it was contended that the applicants have filed this suit on their own behalf and that of the community under Article 23 of *the constitution* hence a justiciable cause of action. Further, it was contended that the failure to engage in public participation before creating the new administrative units was unconstitutional hence a prima facie case established. That it is in the public interest that the orders sought be granted and if not, the affected residents will suffer irreparable harm. Finally, counsel contended that the petition will be rendered nugatory if the orders sought are not granted.
  9. The respondents through Mwise Robi principal state counsel relied on her submissions dated 26-03-2025 thus opposing the application. Literally, learned counsel reiterated the content of her grounds of opposition to the extent that; the applicants have not established a prima facie case; there was



no proof that any of the constitutional provisions have been violated and how; there is no likelihood of the applicants suffering harm or prejudice if the orders are not granted and; that the petition will not be rendered nugatory.

10. In support of the above submission, the court was referred to several authorities inter alia; Center for Rights Education and Awareness (CREAW) & another v Speaker of the National Assembly & 2 others (2017)e KLR., Gatirau Peter Munya(Supra) and Wilson Kaberia Nkunja vs Magistrates and Judges Vetting Board 7 another(2016)e KLR.
11. I have considered the application herein, objection thereof and submissions by both parties. The only issue for determination is whether the applicants have met the threshold for grant of conservatory orders.
12. 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”.
13. The threshold for grant of conservatory orders was emphasized 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).
14. 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 (supra). Similar position was held 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(supra)
15. 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.



16. 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* [supra] 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...”
17. 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 prima facie 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 prima facie case has been established.
18. As regards the question of public interest, one would have to examine the importance of having service delivery units. Among the benefits realizable is job creation and distribution and increased social-economic 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. See *Kenya Ant-corruption Commission vs Deepak Chamanlal kamani and 4 others* (2014)e KLR where the court held that;
- “...a public interest must be a matter in which the whole society has a stake , anything affecting the legal rights or liability of the public at large”
19. In my view, the creation of service delivery units is not an individual benefit but a community benefit. Under article 22(2) of *the constitution* anybody claiming breach of a fundamental right or bill of rights is at liberty to seek redress on his own behalf or in the interest of a group or class of persons. There is nothing wrong therefore in the applicants seeking redress in this matter which I am satisfied is a matter of public interest.
20. 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.
21. 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.
22. In a nut shell, I do not see any prejudice that the respondent will suffer if the orders sought are granted. The respondents have not challenged the claim that public participation was not conducted as required under Article 10 of *the constitution*. The applicants have demonstrated that they deserve the orders which are temporary and not final as submitted by the respondents.
23. In view of the above findings, I am persuaded to hold that the applicants have met the threshold for grant of a conservatory order sought pending the hearing and determination of the petition. Costs shall be in the cause.



**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 8<sup>TH</sup> DAY OF MAY 2025**

**J. N. ONYIEGO**

**JUDGE**

