



**Obore (Suing as the Official and Member of the Kenya Ships Contractors Association)
v CECM - Environment and Solid Waste Management Mombasa County & 8 others
(Constitutional Petition E062 of 2024) [2025] KEHC 9182 (KLR) (18 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9182 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E062 OF 2024**

G MUTAI, J

JUNE 18, 2025

BETWEEN

**BRAMWEL PATRICK OBORE PETITIONER
SUING AS THE OFFICIAL AND MEMBER OF THE KENYA SHIPS
CONTRACTORS ASSOCIATION**

AND

**CECM - ENVIRONMENT AND SOLID WASTE MANAGEMENT MOMBASA
COUNTY 1ST RESPONDENT
GOVERNOR- MOMBASA COUNTY 2ND RESPONDENT
COUNTY GOVERNMENT OF MOMBASA 3RD RESPONDENT
COUNTY ATTORNEY- MOMBASA COUNTY 4TH RESPONDENT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 5TH
RESPONDENT
KENYA MARITIME AUTHORITY 6TH RESPONDENT
KENYA PORTS AUTHORITY 7TH RESPONDENT
THE ATTORNEY GENERAL 8TH RESPONDENT
KENYA SHIP AGENTS ASSOCIATION 9TH RESPONDENT**

RULING

1. The application before the Court is the Notice of Motion dated 8th October 2024. At this point, the applicant seeks prayers 4 and 5 of the said Motion pending the hearing and determination of the petition.



2. The grounds upon which the application is sought is that the applicant is the chairman of the Waste Management Committee of the Kenyan Ships Contractor Association, an association of traders who the Kenya Ship Agents Association contracts to provide various services to shipping companies at the port of Mombasa under the auspices of National Environment Management Authority (NEMA), Kenya Maritime Authority (KMA) and Kenya Ports Authority (KPA). He averred that the members of his association had been dealing with collection of solid waste from inside the docking vessels at the port of Mombasa for many years and that members of the said association had been licensed to do their trade by the County Government of Mombasa, NEMA and KPA to conduct the trade of the specified engagement. He further averred that upon collection of solid waste, they hand it over to the County Government of Mombasa for disposal.
3. The petitioner/applicant averred that members of his association had invested heavily in the training of their staff, licensing and advertisement of their trade and had always duly paid the licensing fees. He averred that it was unfair for the contracts of the association's members to be terminated without due process.
4. The petitioner stated that despite discussions with the 3rd Respondent, the latter was threatening to take over their business, which action would deny the petitioners employment, and thus their socioeconomic rights.
5. The petitioner/Applicant thus prayed for conservatory orders to issue against the Respondents herein.
6. The 3rd Respondent filed Grounds of Opposition dated 14th October 2024, through which they averred that the conservatory orders were not merited as they sought to protect private, and not public interest. It was urged that the applicant/petitioner, and or its members, had not exhausted all the remedies, did not meet the requirements for a representative suit, that the application was a waste of the Court's time, and that the applicants lacked privity of contract. They hadn't exhibited the contracts, and finally, that waste collection and management fell within the purview and mandate of the 3rd Respondents, not the applicants.
7. The 3rd Respondent also filed a Replying Affidavit sworn by Jeizan Faruk, the County Secretary, on 10th November 2024. The deponent averred that solid waste management fell within the purview of the County Government of Mombasa under the Sustainable Waste Management Act, 2012, which had been implemented through the Mombasa County Waste Management (Amendment) Act. The said legislation was enacted following a public participation exercise involving key stakeholders, including the Kenya Ship Agents Association. He further averred that the County Government of Mombasa is mandated to collect waste within Mombasa County, including garbage collected from ships docking at the port of Mombasa. He further deposed that the enactment of the Act was supported by the Shippers' Council of Eastern Africa.
8. The discussions between the petitioner, its members and the 3rd Respondent had not resulted in an agreement. Mr Faruk contended that issuance of conservatory orders would protect the interests of private individuals at the expense of the 3rd Respondent, which acts on behalf of the members of the public in Mombasa.
9. The applicants filed a supplementary affidavit sworn by Bramwell Patrick Opore, vide which the contents of the affidavit in support of the application were reiterated. The deponent averred that there was no evidence of public participation and that the view of the participants was not attached to confirm the same. He deposed that it was unfair for the 3rd Respondent to issue licenses to the petitioner/applicant's members, charge them for the same, and then deny them an opportunity to conduct their trade. He criticized the decision to appoint the Kenya Revenue Authority (KRA) as an



- agent to collect revenue for the 3rd Respondent, saying that it was ill-advised in law. He averred that the impugned contracts had not lapsed and were still in operation. He also stated that the Mombasa County Waste Management (Amendment) Act conflicts with various international instruments to which Kenya is a signatory.
10. The Attorney General as the 8th Respondent filed Grounds of Opposition dated 27th November 2024 in which it was averred that the applicant had failed to demonstrate what irreparable harm they would suffer if the County Government of Mombasa continued to collect the levy or if it continued to collect and dispose of solid waste at the port of Mombasa pending the hearing of the petition.
 11. It was also stated that the applicant hadn't shown that the balance of convenience lay with the grant of the orders sought. Furthermore, it was argued that the application aims to prevent the County Government of Mombasa from collecting revenue, which was against the general interest of the public. Further, the conservatory orders sought were against the general interest of the public, which requires continuity in the collection of solid waste at the port, preventing ambiguity and ensuring sanitary conditions at the port. It was therefore prayed that the application be dismissed with costs.
 12. The 6th Respondent filed a Replying Affidavit sworn by Mr Julius Koech, the acting Director General of KMA, dated 27th November 2024. He deponed that KMA is a regulator of the maritime sector charged with overseeing, as part of its function, ship-sourced pollution through the implementation of national laws and international conventions as provided under Annexe V of the International Convention for the Prevention of Pollution from Ships.
 13. Mr Koech deponed that in carrying out its duties, the KMA must respect Constitutional norms under Articles 10, 21(1), 73(2)(d), and 232(e) of *the Constitution* of Kenya, 2010.
 14. He averred that the applicant did not show that in making its decision enforcing the requisite laws, the 6th respondent acted without or in excess of the powers conferred upon it by law, or violated or contravened *the Constitution*. The applicant had also not adduced sufficient evidence before the Court on merit to show that the Respondents failed to discharge their mandate as provided by law.
 15. Mr. Koech urged that the applicant had failed to provide particulars of the alleged constitutional provisions violated and the acts or omissions complained of in respect of each respondent. He therefore prayed that the application be dismissed for want of merit.
 16. The applicant filed a further Supplementary affidavit sworn on 6th December 2024 in which he averred that the County legislation did not specify that the County would collect waste from docking ships; rather, it allowed the County Government to collect revenues. He averred that the impugned County legislation was unlawful and unconstitutional. He denied that what was sought was the prevention of the County Government from collecting revenue, but that he was merely questioning the unconstitutional practices in legislating laws that will affect the parties irreparably.
 17. The application was canvassed through written submissions. Oral submissions were made on 12th March 2025.
 18. The submissions of the applicant were filed on 16th December 2024. The applicant identified the issue for determination as being whether the petitioner had made a case for the grant of conservatory orders. In support of its case that a case had been made for the grant of the orders sought, the applicant relied on the decision of Onguto, J in Board of Management of Uhuru Secondary School v City County Director of Education & 2 others [2015]eKLR. In the said case, the Court stated that an applicant seeking conservatory orders had to demonstrate that there was an arguable prima facie case with a likelihood of success and that in the absence of a conservatory order, he would likely suffer prejudice. Whether the grant or a denial of conservatory relief would enhance the constitutional values and



objects, whether the denial of conservatory orders would render the substratum of the suit nugatory. It was also urged that the Court would consider the public interest.

19. Counsel for the applicant submitted that there was a prima facie. Reliance was placed on the decision of the Court in *Centre for Rights, Education and Awareness (CREAW) & 7 others vs Attorney General* [2011]eKLR and *LSK vs AG & JSC* [2020]eKLR. It was urged that a prima facie had been demonstrated.
20. It was argued that the applicant and its members would suffer irreparable loss if their economic rights were curtailed, particularly since they had been paying license fees and other statutory requirements to the County Government of Mombasa.
21. Counsel therefore prayed that the application be allowed.
22. The 8th Respondent filed submissions dated 7th January 2025. The Attorney General submitted through Penda, PM, Senior State Counsel, that the Court should apply the decisions of the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014]eKLR and the CREAW case (*supra*).
23. It was urged that the application had contradictions, to wit that it sought an extension of contracts while at the same time claiming that a contract existed. Further, it was denied that there was a privity of contract between the applicant's members and the respondents.
24. Counsel submitted that the Court has to balance the interests of the public against those of the applicants. He stated that the balance of convenience tilted in favour of allowing the collection of funds as currently done through KRA, until the Court decides.
25. The submissions of the 1st, 2nd, 3rd and 4th Respondents are dated 28th February 2025. In the said submissions, Ms. Kisingo learned that counsel for the parties urged that the application be dismissed.
26. M. Kisingo urged that the orders sought would protect the applicant's interests at the expense of public interests. She submitted that the responsibility for collecting solid waste lay with the County Government of Mombasa. Thus, what the applicant sought was to oust the constitutional provisions.
27. Counsel submitted that there was no privity of contract between the applicant and the County Government of Mombasa. In the circumstances, there was no justification for preventing the County government of Mombasa from performing its obligations.
28. Ms Kisingo urged that allowing the application would interfere with the County Government's constitutional duty to collect garbage and that there was no guarantee that if the order were issued, the applicant would still be engaged by the parties with whom they had a contract. Counsel submitted that granting the orders sought would not be in the public interest.
29. Counsel submitted that there is a presumption of constitutionality of every piece of legislation. Reliance was placed on the decision of the Court in the case of *Ndyanabo v Attorney General of Tanzania* [2001]EA 495 and the *Council of Governors v Attorney General & another* [2017]eKLR. Counsel urged that a presumption in favour of the constitutionality of the three impugned County legislations be made.
30. Ms. Kisingo thus prayed that the application be dismissed.
31. The 5th, 6th, 7th & 9th Respondents did not file written submissions, nor did they make oral submissions.



32. I have considered the applications, the responses thereto, the documents annexed to the parties' submissions, and the applicable law. I must now determine whether a case has been made for the issuance of the sought orders.
33. As this is an application for conservatory orders, I must first determine the conditions that an applicant must satisfy for such orders to be issued.
34. The Supreme Court of Kenya in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014]eKLR held as follows:-

“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 courses.”

35. This was echoed by Onguto, J in *Board of Management of Uhuru Secondary School v City County Director of Education & 2 others* [2015]eKLR wherein he stated that:-

1. I state without vacillation that the path to be followed by a court seized with an application under Article 23 (3) (d) is now relatively clear.

1. Foremost, the applicant ought 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. As was stated by Musinga J (as he then was) in the case of *Centre for Rights Education and Awareness and 7 Others –v- The Attorney General* [HCCP No. 16 of 2011]:

“[Arguments] in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the Petitioner’s application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to 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*”.

1. 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 evident a likelihood of success. The prima facie case ought to be beyond a speculative basis. In these respects, I would quickly make reference to M. Ibrahim J (as he then was) in the case of *Muslims for Human Rights [MUHURI] & Others –v- Attorney General & Others* CP No. 7 of 2011, who whilst agreeing with Musinga J’s statement in *Centre for Rights Education and Awareness [CREAW] and 7 Others –v- The Attorney General* (Supra) stated as follows:-

“I would agree with my brother that an applicant seeking conservatory orders in a Constitutional case must demonstrate that he has a prima facie case with a likelihood of success” (emphasis).”



36. From the foregoing, it would appear to me that the following conditions must be met: -
1. There must be a prima facie case with a likelihood of success, and the absence of conservatory orders would likely prejudice the applicant;
 2. Whether the grant or denial of a conservatory order will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights;
 3. Whether, if not granted, the petition of its substratum will be rendered nugatory; and
 4. Where the public interest lies.
37. Does a prima facie exist in this matter? The applicant's members do not have contracts with the respondents. A non-suited party contracts the services they provide.
38. This Court notes that under Article 186(1) of *the Constitution*, the County Government has the following powers:-
- “(1) Except as otherwise provided by this Constitution, the functions and powers of the national government and the county governments, respectively, are as set out in the Fourth Schedule.”
39. The functions of the County Government as provided for under Article 186(1) of *the Constitution*, as read with Part (2) (2)(g) of the Fourth Schedule, include refuse removal, refuse dumps and solid waste management.
40. It would seem to me that what is sought may deny the 3rd Respondent its Constitutional duty to collect solid waste. Given the lack of privity of contract between the parties, I am not convinced that a prima facie case exists at this point. I have warned myself that I do not have the benefit of considering the case in full.
41. I have noted above the fact that issuance of the orders sought may interfere with the duties of the County Government. I would agree with the counsel for the respondents that the Court must presume constitutionality of an Act of national or County Government unless there are extraordinary reasons. There are none in this case. For that reason, I am unable to agree that the 3rd condition has been satisfied.
42. The dispute between the parties is a private matter. I am unable to see how the denial of the sought orders would render the substratum of the suit nugatory. This Court can, if the petition is successful, issue an award of compensation for any loss that has been suffered.
43. Regarding public interest, it would appear to me as trite that public interest lies with allowing the County Government to carry out its duties without hindrance.
44. The upshot of the foregoing is that I have not found merit in the application. The same is dismissed with no orders as to costs.
45. It is so ordered.

DATED AND SIGNED AT MOMBASA THIS 18TH DAY OF JUNE 2025.

DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-



Ms Seif, holding brief for Mr Wangila for the Petitioners;

Mr Nganga, holding brief for Ms Kisingo, for the 1st, 2nd, 3rd & 4th Respondents;

No appearance for the 8th Respondent;

No appearance for the 5th, 6th, 7th & 9th Respondents; and

Arthur – Court Assistant.

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