



REPUBLIC OF KENYA



KENYA LAW
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**Gatiria v Kamunyu & 4 others (Constitutional Petition
E019 of 2024) [2025] KEHC 9619 (KLR) (1 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9619 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CONSTITUTIONAL PETITION E019 OF 2024**

LW GITARI, J

JULY 1, 2025

BETWEEN

MBAE LISBETH GATIRIA PETITIONER

AND

KENNEDY Z. KAMUNYU 1ST RESPONDENT

JOEL MWAURA 2ND RESPONDENT

ANITA KARIMI MBAE 3RD RESPONDENT

THE SPEAKER, THARAKA NITHI COUNTY ASSEMBLY ... 4TH RESPONDENT

THE CLERK, THARAKA NITHI COUNTY ASSEMBLY 5TH RESPONDENT

RULING

1. The applicant filed this Petition together with a Notice of Motion dated 8/10/2024. The petitioner was seeking the following orders in the Notice of Motion:
 1. That the honourable court be pleased to certify the instant application as being of utmost urgency and the same be heard *ex parte* in the first instance.
 2. That pending the inter partes hearing and determination of this application, the honourable court be pleased to issue a temporary conservatory order barring the respondents from moving/discussing any motion of no confidence concerning the petitioner/applicant.
 3. That pending the inter partes hearing and determination of the main petition, the honourable court be pleased to issue a temporary conservatory order barring the respondents from moving/discussing any motion of no confidence concerning the petitioner/applicant.
 4. Any other order/relief the honorable court deems fit to grant.



5. Each party to the petition herein bears the costs of the application and the entire petition.
2. The Notice of Motion was supported by the affidavit of the petitioner and was based on the following grounds on the notice of motion:
 1. That the petitioner/applicant is an elected member of Tharaka Nithi County Assembly representing Ganga Ward.
 2. That the petitioner is the Chairperson of the Public Investments and Accounts Committee of the Tharaka Nithi County Assembly.
 3. That the petitioner has been made aware through the 5th respondent of a planned Notice of Vote of No Confidence on her leadership of the aforesaid committee by the 1st, 2nd and 3rd respondents scheduled for hearing on 9/10/2024.
 4. That the said Notice of a Vote of No Confidence against the petitioner/applicant does not disclose the particulars of the intended vote of no confidence as required under standing order 194(1)(a) of the Tharaka Nithi County Assembly.
 5. That the petitioner/applicant has not been afforded a chance to respond to any allegations against her as the notice served upon her does not disclose the particulars of the intended vote of no confidence against her.
 6. That the 1st, 2nd and 3rd respondents have not supplied any information, materials and evidence to be relied upon in making the decision or taking the administrative action that is intended against the petitioner/applicant.
 7. That the right to fair administrative action is a reflection of some of the national values in article 10 of *the constitution* of Kenya such as the rule of law, human dignity, social justice, good governance, transparency and accountability.
 8. Article 47(1) of *the Constitution* is in mandatory terms that “every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”
 9. That *the constitution* binds all persons and all state organs in the course of performing their duties.
 10. That the provisions in Article 47 to the extent that they require that an administrative action to be expeditious, fair lawful and reasonable, and that where such an action adversely affect a person’s right or fundamental freedom, the affected person is entitled to be given written reasons for the action, is a constitutional control over administrative bodies to ensure that they do not abuse their power and that individuals concerned receive fair treatment when actions are taken against them.
 11. That failure to observe this constitutional decree, for all intent and purposes, undermines the rule of law and the value of Article 19(1) of *the Constitution* which states that the Bill of Rights is an integral part of Kenya’s democratic state as the framework for social, economic and cultural policies.
 12. That the 1st, 2nd and 3rd respondents have tabled for debate a vote of no confidence against the applicant in violation of the standing orders of the County Assembly of Tharaka Nithi and in total disregard of the right to a fair hearing.



13. That if the intended vote of no confidence is debated and determined without the evidence against the petitioner/applicant being supplied to her, the applicant will suffer irreparable loss and damage, hence the urgency of this application.
14. That it is in the interest of justice that tis application is allowed as prayed.
3. The petitioner has supported the Notice of Motion with her affidavit sworn on 8/10/2024. She deposes that she is the elected member of the County Assembly of Tharaka Nithi representing Ganga Ward and is the Chairperson of the Public Investment and Accounts Committee of the said County Assembly. That she moved to this court after she was made aware of a planned Notice of Vote of no Confidence on her leadership of the said committee by the 1st, 2nd & 3rd respondents which was scheduled for hearing on 9/10/2024.
4. The said notice is attached marked MLG1. That under the standing orders of Tharaka Nithi County Assembly No. 194(1) members claiming to make a resolution of no confidence should serve the Chairperson with a written notice of the intended vote of no confidence and disclosing the intended vote. She contends that the notice served on her does not disclose the particulars of the intended vote of no confidence as required under Standing Order No. 194(1) (a) of the Tharaka Nithi County Assembly. The applicant avers that she has not been afforded a chance to respond to any allegations against her as the notice served on her did not disclose the particulars of the intended vote of no confidence against her.
5. It is her contention that the respondents have not supplied her with any information, material and evidence they will be relying on in making the decision or taking the administrative action that is intended against her. The applicant avers that her right to fair administrative action is a reflection of some of the national values under Article 10 of *the Constitution* which include Rule of Law, human dignity, social Justice, good governance, transparency and accountability. That Article 47(1) of *the Constitution* guarantees every person a right to administrative that is expeditious, efficient lawful, reasonable and procedurally fair and that *the Constitution* binds all persons and all state organs in the performance of their duties.

It is the applicant's contention that if the intended vote of no confidence is debated and determined before the evidence to be use against her is supplied, she is likely to suffer irreparable loss and damage.
6. The 4th respondent opposed the application and filed a replying affidavit sworn on 24/10/24 opposing the notice of motion. He is the speaker of the Tharaka Nithi County Assembly and received minutes of the committee meeting held on 4/10/2024 from the 5th showing that the 1, 2, &3 respondents who are committee members of the said committee had met and resolved to hold a meeting and vote of a motion of vote of no confidence against the leadership of the committee. That he became aware that around 8/10/24 there was a communication from the said committee that a notice of a vote of no confidence on the leadership of the Chairperson would be tabled for debate by the committee against the applicant as the Chairperson of the committee pursuant to Standing Order 194 of the County Assembly. That the notice was supported by the signature of three members of the said committee which meets the criterial required under the standing orders of the County Assembly. That the notice outlined the grounds for the proposed vote of no confidence as follows:
 1. Account of performance.
 2. None submission of the relevant reports to the County Assembly.
7. He contends that it is crystal clear that the said notice provided the applicant with the grounds and the reasons for her removal as the Chairperson of the committee. He avers that the notice served on the



applicant provided sufficient grounds and reasons for her removal as the Chairperson of the committee. He submits that the application lacks merits and should be dismissed. The parties agreed to canvas the application by way of written submission.

Applicants Submissions

8. It is submitted that the applicant demonstrated that the notice of vote of no confidence served on her did not disclose the particulars of the intended action and the notice infringed her right to fair hearing. The applicant submitted that the issue which the court has to determine is:

“Whether the application meets the threshold for a grant of a conservatory order pending the hearing and determination of the petition herein.”

The applicant submits that Article 23(3) of *the Constitution* of Kenya gives the High Court jurisdiction to grant any appropriate relief including a conservatory order in instance of violations of infringement for threats of violation or infringement of a right or a fundamental freedom. She also relies on Article 1 of *the Constitution* on the sovereign power of the people but also provides for delegation of the power to various organs.

9. She further relies on Article 2 of *the Constitution* which provides that *the Constitution* is the Supreme Law of the Republic of Kenya and binds all persons and all state organs at both levels of government. She relies on the Supreme Court of Kenya Decision in *Re The matter of the Interim Independent Electoral Commission Advisory Opinion No. 2 of 2011* where it expressed itself as follows:

“The effect of *the Constitution*’s details provisions for the rule of law in the process of governance, is the legality of the executive or administrative actions is to be determined by the courts which are independent of the executive branch...”

10. Prima facie case with probability of success. It is submitted that the threshold of the grant of conservatory orders was set by the Supreme Court in the case of *Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 2 Others (2014) eKLR* which include that a party must demonstrate a prima facie case with the likelihood of success, irreparable loss, that the substratum of the petition will be rendered nugatory.

11. That conservatory orders should be granted on the inherent merit of the case bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant causes. That the applicant has cited Article 50(1) of *the Constitution* on the violation of right to fair hearing. She relies on the *Halsbury Laws of England, 5th Edition 2010 Vol. 61 @ Para. 639* on the right to be heard and states:

“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adopted to govern the proceedings of bodies other than judicial tribunals, and a duty to act in conformity to the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court.”

12. On whether the substratum of the petition will be rendered nugatory if the orders sought are not granted, it is submitted that if the vote of no confidence is allowed to proceed, she will be ousted and a new person employed as the Chairperson and if the petition succeeds she will not be able to get back to her seat. That if the conservatory order is not issued, there will be compounding of illegalities



and unconstitutional actions. The respondent will proceed to appoint a new Chairperson. That it is in the interests of justice that the application be heard and determined urgently.

Respondents Submissions

13. He relies on the case of *Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 2 Others* (2014) eKLR application No. 4/2014 Para 86 where the Supreme Court stated:

“Conservatory orders” bear a note decided public law commutation. For these are orders of facilitate ordered function within public agencies, as well as to uphold adjudicatory authority of the court in the public interest. Conservatory orders, therefore, are not unlike interlocutory injunctions linked to such private 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.”

14. That conservatory orders are therefore, aimed at preserving the substratum of the matter pending determination of the main issues in dispute. That there is need for a court to exercise caution when dealing with any request for such prayers for the reason that matters which are the preserve of the main petition ought not to be dealt with finality at the interlocutory stage. He relies on the decision in *Centre for Right Education and awareness (CREAW) & 7 Others -vs- Attorney General* (011) eKLR. He also relies on *Wilson Kaberia Nkunya -vs- The Magistrate and Judges vetting Board and Others* (2016) eKLR where the court stated that “principles for consideration on whether to grant conservatory orders which include, demonstration of a prima facie case with likelihood of success and that unless the court grants the conservatory orders there is real danger that the applicant will suffer prejudice as a result of the volition or threatened violation of *the Constitution*.”
15. Secondly whether the petition will be rendered nugatory and the consideration of the public interest. The respondent submits that it is incumbent for the applicant to demonstrate a prima facie case with a likelihood of success and that in the absence of conservatory order he is likely to suffer. The respondent submits that the notice served on the applicant was signed by three committee members and meets the criteria required under the standing orders of the County Assembly. It is also the contention by the respondent that the applicant was given reasons for her proposed removal from office thro’ the vote of no confidence to enable her respond effectively.
16. Based on this assertion it is submitted that the applicant has not made out a prima facie case. That it is the business of the court to ensure and as far as possible secure any transitional motions before the court so as not to render nugatory the ultimate and of justice, see *Martin Nyaga Wambora -vs- Speaker of the County Assembly of Embu & 3 Others*. That the petition would not be rendered nugatory as the court retains the power to declare the removal of the applicant as unconstitutional in the event that she is removed in a vote of no confidence.
17. The respondent submits that a mere allegation of contravention of a right or fundamental freedom is not itself sufficient to entitle grant of conservatory orders. The applicant must demonstrate real danger that is so actual, so imminent, so evident and so true so as to warrant the immediate intervention of the court.

Analysis and Determination

18. The petition is premised on various articles of *the Constitution* of Kenya 2010. The issue for determination is whether the application meets the threshold for the issuance of conservatory orders. The principles for granting conservatory orders were stated in the case of *Board of Management of*



Uhuru Secondary School -vs- City County Director of Education and 2 Others (2015) eKLR where the court summarized the principles for the grant of conservatory orders and stated as follows:

- “(i) The needs for the applicant to demonstrate an arguable prima facie case with likely hood of success and to show that in the absence of the conservatory orders he is likely to suffer prejudice.
- (ii) The secondary principal in whether the denial of the conservatory order will enhance the constitutional values and objects of the specific right or freedom in the bill of rights.
- (iii) The court should consider whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
- (iv) Whether the public interest would be prejudiced by a decision to exercise discretion to grant or deny conservatory order.”

19. These principles were also stated in the Supreme Court decision in *Gatirau Munya -vs- John Githinji and Another (Supra)*. The contention by the applicant is that her rights were violated as the notice of motion of no confidence against her did not disclose the particulars of the intended vote of no confidence on her leadership of the Public Investment and Accounts Committee. The rights to fair hearing is entrenched in *the Constitution*. Article 50(1) of *the Constitution* provides that:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

20. Under Article 50(2) there are various guarantees on the right to fair trial. Article 2(1) and Article 20(1) of *the Constitution* forms the basis for the application of the bill of rights to all and binds all state organs and all persons.

21. A conservatory order is a judicial remedy sought or issued by a court to preserve a subject matter until a petition is heard and determined. It is an order of status quo ante so that the substratum of the petition is preserved or so that the same is not rendered an academic exercise. It is well settled that the principles that guide the court in determining whether or not to issue conservatory orders are the party establishes a prima facie case with high probability of success and in the absence of the conservatory order, he is likely to suffer prejudice.

22. Secondly that if the order is not granted or it is granted the relief will enhance the Constitutional values and objects of the specific right or freedom in the bill of rights. The party must also demonstrate that if an interim conservatory order is not granted the petition or its substratum will be rendered nugatory. The court will also consider whether granting the conservatory order is necessary in the public interests.

23. This court is called upon to determine the question as to whether or not conservatory orders should be granted pending the hearing and determination of the substantive petition. The respondent has urged the court to find that it complied with the standing orders and gave the applicant the particulars for moving the motion of no confidence.

24. Standing Order 194 of Tharaka Nithi County Assembly –

“Vote of no confidence in the Chairperson or Vice Chairperson.



“Members claiming to make a resolution of no confidence in the Chairperson or Vice Chairperson shall, if they constitute a majority:

- a. Serve the chairperson or vice chairperson with a written notice of the intended vote of no confidence signed by such majority and disclosing the particulars of the intended vote of no confidence, and
 - b. Deliver to the chairperson of Liason Committee a notice signed by such majority, calling for a meeting of the particular committee to consider the particulars upon which their claim is based.”
25. The applicant attached the minutes of the meeting where a resolution to pass a motion expressing a vote of no confidence to the leadership and a notice to call a meeting to consider the particulars upon which the claim is based to be delivered to the chairperson of the liason committee. In her affidavit the applicant avers that she was served with the notice but the particulars were not disclosed. In view of the foregoing it is evident that the applicant was served with the notice. The minutes states that the particulars which motion is based.
- i. Account of performance.
 - ii. No-submission of the relevant reports to the County Assembly.
26. It is demonstrated as stated by the respondent that the notice of vote of no confidence was supported by the signatures of three members of the Committee which meets the criterial required under the standing orders of the County Assembly. The petitioner contends in her grounds that she was not afforded a chance to respond to the allegations. The court is called upon to determine whether a prima facie case has been established, it should not delve into 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, see the Centre for Right Education and Awareness (CREAW) & 7 Others -vs- Attorney General (Supra).
27. I should not therefore delve into detail analysis, but determine whether a prima facie case with a likelihood of success and that unless he court grants the conservatory order there is a real danger that he will suffer prejudice as a result of the violation or the threatened violation of *the Constitution*. See Law Society of Kenya -vs- Attorney General & Judicial Service Commission (2020) eKLR where it was stated that:
- “At this stage I am alive to the fact that the court is not supposed to examine the merits of the petition but has to consider whether the petitioner has established a prima facie case to warrant interim orders of protection in order to secure the substratum of the suit and not to redder the petition herein nugatory and become a mere academic exercise.”
28. It is my view that the applicant was served with a notice disclosing particulars for the motion of no confidence. The particulars disclosed are none performance and failure to submit the reports to the County Assembly has not demonstrated that the right to be heard was violated as the minutes show that a notice calling for the meeting to discuss the motion was scheduled on 9/10/2024. The fact that the particulars were supplied in line with the standing orders rules out the contention that she is likely to suffer irreparable loss and damage.
29. The demonstration that the party has a prima facie case is key in determining this application as it relates to the petition. The party must demonstrate the three principles and without a prima facie case it means that the petition has no chance of success.



Conclusion

30. The application has no merits and is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 1ST DAY OF JULY 2025

HON. LADY JUSTICE L. GITARI

JUDGE

