



**Mwaniki v Ndiga & 3 others (Constitutional Petition
E020 of 2024) [2025] KEHC 9562 (KLR) (1 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9562 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CONSTITUTIONAL PETITION E020 OF 2024**

LW GITARI, J

JULY 1, 2025

BETWEEN

NJAGI ZACHARIA MWANIKI PETITIONER

AND

LUCY MUTHONI NDIGA 1ST RESPONDENT

NJAGI JOSEPH KINYUA 2ND RESPONDENT

THE SPEAKER, THARAKA NITHI COUNTY ASSEMBLY ... 3RD RESPONDENT

THE CLERK, THARAKA NITHI COUNTY ASSEMBLY 4TH RESPONDENT

RULING

1. The applicant is a nominated member of the County Assembly of Tharaka Nithi representing the youth. At the time of filing the petition he was the Chairperson of the Water Environment and Natural Resources Committee of the County Assembly of the Tharaka Nithi where the 1st & 2nd respondents are members of the aforesaid committee. The applicant avers that he became aware through a planned notice of a vote of no confidence on his leadership of the said committee by the 1st & 2nd respondents which was scheduled for hearing on 9/10/2024. The notice of the vote of no confidence attached to his replying affidavit.
2. That under Standing Order 194(1) of the Tharaka Nithi County Assembly it is provided that a written notice of he intended vote of no confidence be served on the chairperson stating the reasons for the intended vote of no confidence. The applicant contends that the notice served on him did not disclose the particulars of the intended vote of no confidence as required under Standing Order 194(1) of the Tharaka Nithi County Assembly. It is the contention by the applicant that he was not afforded an opportunity to respond to any allegations against him as the notice served upon him by the 4th respondent does not disclose the particulars of the intended vote of no confidence against him. The



applicant further avers that the 1st & 2nd respondent have not supplied any information, material and evidence to be relied upon in making the administrative action.

3. That the right to fair administrative action is a reflection of National Values in Article 10 of *the Constitution* such as rule of Law, human dignity, social justice, good governance, transparency and accountability. He relies on Article 47 (1) of *the Constitution* and avers that it is couched in mandatory terms that, “Every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”
4. The applicant further avers that *the Constitution* binds all person and all state organs in the performance of their duties and failure to observe these Constitutional Decrees, for all intents and purpose undermines the rule of law and the values under Article 19(1) of *the Constitution*. The applicant submits that if the motion is debated without the evidence against him being supplied, he will suffer irreparable loss. He prays that the application be allowed.
5. The respondent opposed the application and filed a replying affidavit sworn by John Mbabu who is the Speaker of Tharaka Nithi County Assembly. He confirms that the applicant is a nominated member of the County Assembly and the Chairperson of the Water, Environment and Natural Resources Committee of the County Assembly of Tharaka Nithi. He avers that he is aware of the notice served on the applicant on 9/10/24 which was signed by six members. That the notice meets the criterial required under standing orders of the County Assembly. That the applicant was given the ground of the proposed vote of no confidence of which included:
 - i. Account of Performance.
 - ii. None submission of relevant reports to the County Assembly.

That the said notice complied with the requirements of the standing orders and is therefore without merits. The respondent has urged the court to dismiss the application. The application was canvassed by way of written submissions.

Submissions by the Applicant

6. The applicant has raised one issue for determination. That is; Whether the application meets the threshold for the grant of a conservatory order. She submits that the court has jurisdiction under Article 23(3) of *the Constitution* to grant any relief including conservatory orders where there are instances of allegations of violation or infringement of a right or fundamental freedoms.
7. That Article 1 of *the Constitution* reposes the sovereign power of the people of Kenya but provides for the delegation of that power to various state organs which include Parliament, the County Assemblies, the Executive at the National and County levels of Government, the Judiciary Independent Tribunals and Commissions. That for effective exercise of that delegated power *the Constitution* allocates functions, powers and responsibilities to all these state organs. That Article 2 of *the Constitution* provides that *the Constitution* is the Supreme Law of the Republic and binds all persons and all State Organs at both levels of government. She relies on he Supreme Court decision in Re Matter of the Interim Independent Electoral Commission Advisory Opinion No. 2 of 2011 where the court stated that the legality of executive or administrative actions is to be determined by the courts which are independent of the executive branch.

Prima Facie case with probabilities of success

8. The applicant relies on the case *Gatirau Munya -vs- Dickson Mwenda Kithinji & 2 Others* (2014) eKLR on the threshold for the granting of conservatory orders. That the applicant is required to



demonstrate an arguable case. That under Article 47(1) & (2) of the Constitution A person who is likely to be affected by administrative action has a reasonable expectation that they will be given a hearing before any adverse action is taken, Article 47(2). That the notice of vote of no confidence has no particulars or reasons of his planned removal. That the applicant's right to fair hearing which is guaranteed under Article 50(1) of the Constitution was violated. The article guarantees the right to have any dispute determined in a fair and a public hearing before a court or if appropriate, another independent and impartial tribunal or body. The applicant relies on Halsbury's Laws of England 5th Edition 1020 Vol. 61 at Para 639 on the right to be heard.

Whether the substratum of the Petition will be rendered nugatory if the orders are not granted:

9. It is submitted that if the conservatory orders are not issued to suspend the notice of motion of a vote of no confidence there will be compounding of illegalities and unconstitutional actions as the respondents will proceed and appoint the new chairperson when the procedure of removal of the current one has not been followed. That the court has an obligation to intervene where the Constitution has been violated or is threatened with violation. That this court being the only arm of government vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions has the duty and obligations to intervene in actions of either arms of government and state organs where it is alleged or demonstrated that the Constitution has either been violated or was threatened with violation.

Respondents Submissions

10. The respondents submits that they are opposed to the granting of conservatory orders pending the hearing and determination of the main petition. They submit that the principles for granting conservatory orders were settled by the Supreme Court in the Civil Application No. 5/2014 Gatirau Peter Munya -vs- Dickson Mwenda Kithinji 7 2 Others (2014) eKLR where the Supreme Court stated that, "Conservatory Orders" bears a more decided public law connotations: for these orders are to facilitate ordered function within public agencies as well as to uphold the adjudicatory authority of the court is the public interests. Conservatory orders, therefore, are not, unlike interlocutory injections, 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.
11. That the conservatory orders are aimed at preserving the substratum of the matter pending the 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 a preserve of the main petition are not to be dealt with finality at the interlocutory stage. He relies on Centre for Rights, Education and Awareness (CREAW) & 7 Others -vs- the Attorney General (2011) eKLR.
12. He further relies on Wilson Kaberia Nkunja -vs_ The Magistrates & Judges Vetting Board & Others (2016) eKLR where the court held that a party must demonstrate that he has a prima facie case with a likelihood of success and that unless the conservatory orders are granted there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.
13. Secondly that, if a conservatory order is not granted the petition alleging violation of or threat of violation of rights will be rendered nugatory. That public interest must be considered before grant of a conservatory order.
14. The respondent submits that it was upon the applicant to demonstrate that he has a prima facie case with likelihood of success and that in the absence of the conservatory orders, he is likely to suffer prejudice. He submits that the notice of the vote of no confidence served on the applicant was



supported by signatures of two members of the committee and gave the reasons for the intended of the removal of the Chairperson of a committee. He submits that standing order 194 of the County Assembly was complied with. He relies on *Martin Nyaga Wambora -vs- Speaker of the County Assembly of Embu & 3 Others* Pet. No. 7/2014 on the question whether the petition or its substratum will be rendered nugatory and submits the petition would not be rendered nugatory if the prayers for conservatory order is declined as the court still has powers to declare the removal unconstitutional in the event that he is removed in a vote of no confidence. That a mere allegation of violation is not sufficient for the granting of the 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. The respondent prays that the applicant be denied.

Analysis and Determination

15. 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.”

16. 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 his rights were violated as the notice of motion of no confidence against him did not disclose the particulars of the intended vote of no confidence on his 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.”

17. 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.

18. 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 that 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.
19. 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.
 20. 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.
 21. 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.”
 22. 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 his affidavit the applicant avers that he 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.
 23. It is demonstrated as stated by the respondent that the notice of vote of no confidence was supported by the signatures of six members of the said Committee which meets the criterial required under the standing orders of the County Assembly. The petitioner contends in his grounds that he 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).
 24. I should not therefore delve into detail analysis, but determine whether a prima facie case with a likelihood of success has been established and that unless the 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 render the petition herein nugatory and become a mere academic exercise.”

25. 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. The applicant 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 he is likely to suffer irreparable loss and damage.
26. 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.

In Conclusion

1. The notice of motion lacks merits and is dismissed.

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

HON. LADY JUSTICE L. GITARI

JUDGE

