



**Luka v Narok Bursaries Management Board & 6 others; Narok
County Assembly (Interested Party) (Constitutional Petition
E016 of 2023) [2024] KEHC 104 (KLR) (11 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 104 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CONSTITUTIONAL PETITION E016 OF 2023**

SM MOHOCHI, J

JANUARY 11, 2024

**IN THE MATTER OF AN APPLICATION FOR ORDERS PERSUANT
TO ARTICLE 22 AND 23 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 10, 27
(4), 35, 47, 20(A) (D) (E) AND 232 OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF SECTION 8 OF THE NAROK COUNTY BURSARIES ACT 2013

AND

IN THE MATTER OF THE FAIR ADMINISTRATION ACTION ACT NUMBER 4 OF 2015

AND

**IN THE MATTER OF UNPROCEDURAL, ILLEGAL, PRECARIOUS AND
IRREGULAR AWARD OF BURSARIES FOR THE FINANCIAL YEAR 2023/2024**

BETWEEN

JIMMY PARNYUMBE LUKA PETITIONER

AND

THE NAROK BURSARIES MANAGEMENT BOARD 1ST RESPONDENT

**THE WARD BURSARIES COMMITTEES, NAROK COUNTY
GOVERNMENT 2ND RESPONDENT**

**COUNTY EXECUTIVE COMMITTEE MEMBER IN CHARGE OF FINANCE &
ECONOMIC PLANNING NAROK COUNTY 3RD RESPONDENT**

NAROK COUNTY GOVERNMENT 4TH RESPONDENT



THE GOVERNOR NAROK COUNTY GOVERNMENT 5TH RESPONDENT
THE ETHICS AND ANTI-CORRUPTION COMMISSION ... 6TH RESPONDENT
THE ATTORNEY GENERAL 7TH RESPONDENT

AND

THE NAROK COUNTY ASSEMBLY INTERESTED PARTY

RULING

1. This Petition was filed together with a Notice of Motion Application both evenly dated December 22, 2023 and came up ex-parte before Hon C Kariuki Judge who allowed on a temporary basis an interlocutory order of injunction and/or Conservatory Order restraining the 1st, 2nd and 3rd Respondents from awarding any bursaries and or releasing any funds for award of bursaries for the financial year 2023-2024.
2. The Court Allowed the Temporary order until the 17th of January 2023 when this matter is to be mentioned.
3. It is the conservatory order issued, that triggered the Application under certificate of urgency, by the 3rd 4th and 5th Respondents, by way of a chamber summons and notice of motion filed pursuant to Section 10(1) (2) (a) of the High Court (Organisation and Administration) Act, 2015, Section 3 (2) of the High Court Practice and Procedure Vacation Rules Section 1A, 1B, 3, 3A of the Civil Procedure Act, and Under Articles 48, 50 (1) and 159 of the Constitution of Kenya, 2010, Sections 1A, 1B, 3A of the Civil Procedure Act and Order 51, Rule 1 of the Civil Procedure (Amendments Rules) 2020 dated January 2, 2023, Anotice of Motion which *inter alia* sought;
 1. Spent
 2. That the Honorable Court be pleased to hear the Application for setting aside, vacating and/or varying the interlocutory order of injunction and/or conservatory orders issued on the 22nd day of December, 2023 by Hon. C. Kariuki J. during the Court's vacation.
 3. Spent.
 4. That this Honorable Court be pleased to set aside, vacate and/or vary the Orders issued on the 22nd day of December, 2023 by Hon. C. Kariuki J. and momentarily allow the 1st, 2nd and 3rd Respondents to proceed with the bursary disbursement process scheduled to take place in the week between the 2nd day of January, 2024 through to the 6th day of January, 2024 in view of the impending school reopening date set for the 8th day of January, 2024 as per the Ministry of Education Guidelines.
 5. That in the alternative the Honorable Court does set aside, vacate and/or vary the orders issued on the 22nd day of December, 2023 by Hon. c. Kariuki J. and reserve this Application for oral arguments before the Honorable Court on a date of the Courts convenience or between the 3rd day of January, 2024 to the 5th day of January, 2024 in a bid to forestall the enormous prejudice likely to be suffered by the thousands of students, pupils and children who are set to reopen school on the 8th day of January, 2024 and they risk their school fees not being paid.



6. That this Honorable Court do make any balancing order alive to the risk the thousands of students, pupils and children stare at if the schools reopen on the 8th day of January, 2024 as per the Ministry of Education Guidelines with their school fees not being paid because of the injunctive orders granted on the 22nd day of December, 2023 halting the bursary disbursement process and noting the matter is set to be mentioned on the 17th day of January, 2024 which shall be way after school reopening date and these students have a guaranteed and inalienable right to education as per the Constitution of Kenya.
7. That the costs of this both Applications be in the cause.
4. On the 3rd of January 2024, this instant Application came up before Hon F. Gikonyo Judge he duly certified the same as urgent directed that service be affected upon the Petitioner and the same was fixed for hearing on the 8th of January 2023 before me.
5. It is noteworthy that the primary basis for the urgent hearing had been premised on the bursary disbursement process scheduled to take place in the week between the 2nd day of January, 2024 through to the 6th day of January, 2024.
6. The application was argued and heard on the January 8, 2024 the time of which the 1st & 2nd Respondents were represented by mr. Mengati holding brief for Tuya, the 3rd 4th and 5th Respondents had common representation in Mr. Maina Ngaruiya and the Interested Party was represented by Mr Onsongo holding brief for Leonida as follows;

The Applicant-1st, 2nd Respondents Case

7. That the application follows the petition and orders issued by C Kariuki on 22.12.23. and that they seek to set aside and vacate the same as they barred disbursement of bursary as is common place. Schools are reopening this week and bursary benefits 43,000 students annexure 2 which is marked as "JMT 2". That the court will notice the 43,997 beneficiaries, school-going children.
8. That Applicant-1st, 2nd Respondents are before court pursuant to article 165 (3) (b) that calls upon the court that grants powers to the court in a scenario like this.
9. The Petitioners moved court alleging violation of the Constitution.
10. That the right to the school going children not to be in school Article 43 every person has a right to education and similar breath compulsory basic education.
11. That Applicant-1st, 2nd Respondents moved to court seeking a balancing scenario and, in the meantime, allow students continuing with the education which should not be jeopardized.
12. The 3rd Respondent has gone further to give a written undertaking "JMT 1" where the County Secretary undertakes to appear before court and render an account and if the bursaries are disbursed the County Secretary to account so that we save the 43,000 students.
13. In the circumstances we will seek you allow prayer (b) to allow the disbursement and any other orders as the court may allow.
14. Lastly the Applicant-1st, 2nd Respondents raise one issue to do with the capacity of the petitioner to move court and that he moved court pursuant to an Act of 2013 Section 17 provides a redress mechanism. Section 17 Doctrine of exhaustion has not been addressed.
15. On the part of the Applicant-1st, 2nd Respondents they have presented before court a proper undertaking in a bid to confirm the readiness to abide by the court orders.



The Applicant-3rd Respondent and 4th and 5th Respondents Case

16. That in the *Narok County Bursary Act 2013* the appointment of committee members is clear and we have representation of person living with disability and if the orders were vacated there will be no prejudice if the orders were vacated.
17. If there is an issue then Section 17 can deal with the issue.

The Interested Party's Submission

18. The Interested Party submitted on 2 issues:
1st issue is that, the County Assembly enacted the bursary fund act it provides a clear framework for management and disbursement of bursary with the intention of realization of Article 43.
19. That the role of County Assembly is only oversight in terms of management of bursaries and the allegation made by the petitioners is false and no evidence has been tabled to show the involvement of MCAs.
20. That Section 9 *County Government Act 2012*, the only role of MCA is consultation with electorate on public service delivery.
21. There is no interest by County Assembly and no evidence has been tabled to assert the same.
22. The County Assembly of Narok only takes part in reviewing the annual reports as required by law and there is a clear framework 1st respondent and 2nd respondent who are involved in bursaries pointing out the Narok bursary regulations 2022.
23. The Interested Party submit that the students shall be adversely affected by the orders in place.

Petitioner/Respondent's Case

24. He appeared in person, submitting that, the court on 22/12/23 issued conservation orders. That he was served with application to set aside. He relied on replying affidavit dated 05/01/24 Principally submitting that the varying the order shall deprive him the right to hearing.
25. That given opportunity he shall demonstrate how the bursary has been mismanaged.
26. That there is no evidence that any child will be left out of school and that Setting-aside of the orders shall, allow the transgression ongoing.
27. The Petitioner Respondent is willing to abide strict timelines urging that the application dated 02/1/24 be dismissed.
28. That there is no evidence that anyone will be affected if the orders are vacated.
29. That the lawyers ganging-up and 372 million was misappropriated.
30. That the 400 million should be frozen until the case is heard and that the application be dismissed.

Determination

31. As earlier noted the Conservatory orders in contest were temporary in nature to last until the January 17, 2024 where further directions would be made thereby making the only sole issue at hand for consideration by this court to be;



Whether the Conservatory orders dated 22nd December 2023 should be Varied and/or set aside.

32. In determining whether the orders of 22.12.23 should be set-aside, this court is minded of a similar application for the setting aside of conservatory orders, in the case *Okiya Omtata Okiiti v Commissioner General, Kenya Revenue Authority and Two Others* [2017] eKLR, the Court held that: to set aside conservatory orders, the Court must be satisfied that the applicant will be irreparably injured, absent of a stay; That the court is required to consider whether the issuance of a stay order will substantially injure the other parties interested in the proceedings; and it is bound to consider where the public interest lies.
33. This Court unpersuaded that, the petitioner has satisfied the tests for granting, extending or retaining the conservatory orders dated December 22, 2023, it was necessary to issue conservative orders ex parte to preserve the substratum of the Petition pending the hearing and determination of the same, and that without the conservatory orders as sought, the Petition was at risk of being rendered a mere academic exercise however the onus to demonstrate this was upon the Petitioner in hearing.
34. While this Court has a constitutional mandate to protect the supremacy of *Constitution* by ensuring that all laws conform to the *Constitution* it can only do so upon presentation of cogent evidence and the law.
35. A conservatory order, is one of the appropriate reliefs available to a party who alleges and proves denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights with the sole purpose of conservatory orders is to preserve the substratum of the Petition before the Court pending the hearing and determination of the same.
36. The Court further noted that in the case of *Gatirau Peter Munya v Dickson Mwenda Kitbinji and Two Others* [2014] eKLR, the Supreme Court set out the test for the granting of conservatory orders with three components. A party seeking conservatory orders must demonstrate to the Court that: the Petition is arguable and not frivolous; unless the orders sought are granted in the suit, were it to succeed, it would be rendered nugatory; and it is in the public interest that the orders are granted.
37. The Applicant/Petitioner is entitled to the enforcement of his fundamental rights where a breach is alleged to have occurred or is continuing. A cursory look at the petition indicates a gazette notice as being the substratum of the petition. He However alleges corruption shall occur on the disbursement of bursaries if the temporary conservatory orders issued on the 22nd December 2023 are set aside.
38. In Civil Application No. 5 of 2014 *Gatirau Peter Munya -vs- Dickson Mwenda Kitbinji & 2 others* (2014) eKLR, a two bench of the Supreme Court Judges stated as follows on Conservatory orders:

“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 stay 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”.



39. In the case of *Centre for Rights Education and Awareness (CREW) & 7 others -vs- Attorney General* [2011] eKLR, Justice Musinga (as he then was) stated as follows: -
- “ At this stage a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with likelihood of success 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 threatened violation of the *constitution*”.
40. It is in light of the above decisions that I will seek to determine whether the Petitioner deserves any conservatory orders. The Petitioner was expected to demonstrate that he has a prima facie case with Probability of success.
41. Upon Considering the Application and supporting Affidavit by the Applicant/Petitioner a prima facie case is laid out on the Legality and constitutionality of the suspension and if the same would constitute an infringement of any of his fundamental rights, which issue shall be answered in the determination of the Petition.
42. The Petitioner/Respondents has not in any way demonstrated the eminent danger of prejudice he shall suffer if the Conservatory Order is set aside, in fact alleged misappropriation and or blatant theft of bursary is not evidenced.
43. The Petitioner Respondent equally exhibited lack of concern that the conservatory order would effectively bar over 43,000 from commencing school this time and that this court has to consider the public interest consideration that is majoritarian.
44. The Court nonetheless observes that, the Applicants /Respondents equally did not show-case and evidence, the bursary to be disbursed, the beneficiaries and the schedule of the same.
45. I am unpersuaded on the Applicants-Respondents public consideration case, but concur that the temporary Conservatory Orders were to be argued and defended which is lacking on the part of the Petitioner.
46. It is in light of the above that I will seek to determine whether the conservatory orders issued herein warrant setting aside or varying.
47. The Petitioner was expected to demonstrate that he has a prima facie case with Probability of success, he was to show case the public interest in favor of suspending disbursement of bursary to thousands of applicants her failed by making narrow arguments on discrimination on the basis of disability.
48. The Conservatory Order issued on 22nd December 2023, affects the current financial year, while parties have only provided documents relating to the financial year 2022-2023 the leads one to the logical conclusion that no shred of evidence exists that the Narok County Bursary for the Financial year 2023-2024 shall be put to waste by corruption or otherwise.
49. Given the circumstances of this case, I am satisfied that the Applicant has demonstrated that sufficient public interest exists and the orders setting-aside or to vary the conservatory orders are merited. This stems from the gazettement vide *Gazette Notice 17418* on the Appointment of the Narok Bursary Board being the substratum of the petition and that the allegations of corruption relating to disbursements of the Bursary maybe showcased in and during the hearing of the petition.
50. The Petitioner has not showcased the public interested consideration that outweighs the varying of the order. In fact he appeared to represent a small minority group.



51. This Court hereby Allows the Application and varies the Orders dated 22nd December 2023 as follows; That the Unequivocal undertaking dated 02nd January 2024 by the 3rd Respondent the County Secretary to appear before court and render an account if the bursaries are disbursed, is personal and binding on him as filed in court. That an Order is hereby issued, for the 3rd Respondent to render an exhaustive account relating to all disbursements of bursaries for the financial year 2023-2024 before determination of the Petition. That, the Main Petition shall be mentioned for directions before the High Court at Narok on the 17th January 2024 to be heard as a matter of priority.

It is so ordered.

SIGNED, DELIVERED VIRTUALLY ON TEAMS PLATFORM ON THIS 11TH JANUARY 2024

MOHOCHI S.M

JUDGE

