



Shuri & another v Cabinet Secretary for Interior & National Administration & 4 others (Petition E008 of 2024) [2024] KEHC 5247 (KLR) (17 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5247 (KLR)

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

PETITION E008 OF 2024

JN ONYIEGO, J

MAY 17, 2024

**IN THE MATTER OF VIOLATION AND THREATENED VIOLATION OF RIGHTS AND
FUNDAMENTAL FREEDOMS UNDER ARTICLES 1,2,6(2),10,11(1),19,20,21,22(1),47,73(1),
153,174,232,258(1) AND 259(1) (B) OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF NATIONAL GOVERNMENT CO-ORDINATION ACT

AND

IN THE MATTER OF COUNTY GOVERNMENTS ACT, NO. 17 OF 2012

AND

IN THE MATTER OF THE FAIR OF ADMINISTRATIVE ACTION ACT

BETWEEN

ABDIKAMIL ABBEY SHURI 1ST PETITIONER

ZAKARIA ABDI DAUD 2ND PETITIONER

AND

**CABINET SECRETARY FOR INTERIOR & NATIONAL
ADMINISTRATION 1ST RESPONDENT**

COUNTY COMMISSIONER, GARISSA 2ND RESPONDENT

DEPUTY COUNTY COMMISSIONER, DAADAB 3RD RESPONDENT

DEPUTY COUNTY COMMISSIONER, FAFI 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT



RULING

1. *Vide* a petition dated 01-03-24 brought pursuant to articles 1,2,6(2),10,11(1),19,20,21,22(1),4773(1), 153, 154, 252, 258(1)] and 259(1) of the constitution, the petitioner sought for declaratory orders as follows;
 - a. A declaration that the directive issued by the Cabinet Secretary *vide* Gazette Notice No. 1766 of the 14th February, 2024 is unlawful and unconstitutional and in violation of Articles 10, 47 and 174 of the constitution for relocating Hagarbul Sub location from Dadaab Sub County to Fafi Sub County.
 - b. The 1st Respondent be permanently restrained from implementing the decision to relocate Hagarbul Sub location to Fafi Sub County *vide* Gazette Notice Number 1766 of 14th February, 2024 and any directive in furtherance of such decision.
 - c. Any other relief.
 - d. Costs be provided for.
2. Contemporaneously filed with the application is a notice of motion dated 01.03.2024 seeking orders as follows;
 - i. Spent.
 - ii. That this Honourable Court be pleased to issue a conservatory order staying the implementation of the impugned Gazette Notice No. 1766 Vol. Cxxvi – No. 17 dated the day of 14.02.2024 that creates the proposed Hagarbul Sub Location within Dertu Ward under the Fafi 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 No. 1766 Vol. Cxxvi – No. 17 dated the day of 14.02.2024 that creates the proposed Hagarbul Sub Location within Dertu Ward under the Fafi 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 anchored on the grounds set out on the face of it and further, amplified by the supporting affidavit of Zakaria Abdi, the first applicant/ petitioner herein sworn on 01.03.2024 on his own behalf and that of the 2nd applicant/ petitioner.
4. The applicant's case is based on the fact that on or about the 14th February, 2024, the 1st respondent while exercising his mandate as the cabinet secretary for the Ministry of Interior and National Co-ordination published Gazette Notice No. 1766 Vol. Cxxvi – No. 17 establishing new administrative units as service delivery co-ordination units. It was his case that in as much as he was aware that through these administrative units, the government allocates and distributes resources and citizens access government services, he faulted the manner in which the same was done.
5. That among the units created is the Hargabul sub location which has been listed as a sub location within Fafi Sub County despite the same being a sub location in Alango Arba location in Daadab Sub



- County. It was urged that the impugned Gazette Notice No. 1766 Vol. Cxxvi – No. 17 purported to reorganize and recreate the existing boundary between Fafi and Daadab sub county. He averred that the same as a result, risks creating distress, unnecessary tension and conflict among the members of Hargabul area who are predominantly from the Awliyahan clan and the Fafi sub county which is inhabited by the Abudwak clan.
6. The applicant deposed that the 1st respondent's decision did not allow for meaningful public participation and neither did it give reasons for the relocation of Hagarbul sub location and therefore, the same was contra the provisions stipulated in the constitution. That the purported re-allocation will affect various development programs which were implemented in the sub location as part of the larger Alango Arba location such as dispensaries, roads, water points, markets and grant of bursaries etc.
 7. It was contended that the petitioners are apprehensive that the 1st respondent's directive if not stayed and set aside, will result in conflict and disruption of the already existing administrative units. That if the orders sought herein are granted, the respondents will suffer no prejudice as the great public interest tilts in favour of the petitioners.
 8. In opposing the application, Ms. Kiramana, Counsel for the respondents filed grounds of opposition dated 13.03.2024 urging that the applicants did not meet the threshold for grant of conservatory orders. counsel urged that conservatory orders should be granted on the inherent merit of a case bearing in mind the public good, constitutional values and level attributable to the relevant causes. To buttress that position, the court was referred to the case of Gatiirau Peter Munya v Dickson Mwenda Kinthinji & 2 Others [2014] eKLR,
 9. Learned counsel opined that, although the impugned gazette notice established more than one hundred new administrative units as service delivery coordination units country wide, the establishment of Hargabul sub location within Dertu ward in Fafi Sub county, should not be used to prejudice the operations of other units where no problem exists.
 10. Counsel argued that in terms of public interest, the scales of justice fall on the side of denying the interim conservatory orders and having the petition heard on its merit. That this will avoid unnecessary interference with the operations of the government and service delivery to the people. As such, this court was urged to dismiss the application herein with costs.
 11. The court directed that the application be canvassed by way of written submissions. Vide the written submissions dated 12.03.2024, the applicants submitted on three issues as follows:
 - i. Whether the petitioners are entitled to the conservatory order
 - ii. Whether the petitioners will suffer prejudice if the orders sought are not granted.
 - iii. Whether the petition will be rendered nugatory
 12. On the first issue, counsel urged that 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. Counsel opined that, the 1st respondent having acted unilaterally and contra the constitution, it was necessary that the conservatory orders be granted. To that end, reliance was placed on the holding in the cases of Gatiirau Peter Munya v Dickson Mwenda Kinthinji & 2 Others [*supra*] and Invesco Assurance Co. Ltd v MW (Minor suing through the next friend and mother (HW)) [2016]
 13. On the establishment of a *prima facie* case, it was argued that the action of the 1st respondent was likely to affect the people of Haragbul and Daadab sub county as their boundaries have purportedly been recreated. It was urged that the 1st respondent's mandate as provided under the National Government



Co-ordination Act is to establish units while according respect to the county government decentralized units established under the County Governments Act.

14. That the said action by the 1st respondent was ultra vires as the same went against the statutory provisions of the National Coordination Act while also offending on the petitioners' right to fair administrative action and legitimate expectation. Reliance to that end was further placed on the cases of Katiba Institute vs Judicial Service Commission & 2 Others; Kenya Magistrates and Judges Association & 2 Others (Interested Parties) Constitutional Petition E128 of 2022 KEHC 438 (KLR) (Constitutional and Human Rights) Re Bivac International SA (Bureau Veritas) (2005) 2 EA 43 where it was held that a court must undertake an intellectual exercise and consider without making any findings, the scope of the remedy sought, the grounds and the possible principles of law involved.
15. That the 1st respondent did not allow for meaningful public participation neither did it give reasons for the relocation of Hagarbul sub location and therefore the said act by the 1st respondent was *ultra vires*.
16. It was counsel's contention that the 1st petitioner's impugned action went contra the provisions of articles 10 and 232 of the constitution as the same violated the principles of democracy and public participation. As such, it was urged that the applicants established an arguable case with a likelihood of success. Additionally, that the remedy sought is reasonable as the same sought to remedy a wrong already committed by the 1st respondent.
17. On public interest, this court was urged that the constitution and the law must not only be respected but also followed. Therefore, an allegation that the constitution is violated or is threatened with violation ought not be taken lightly. Reliance was placed on the case of Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 Others, CCT 86/08[2010] ZACC 5 where it was held that where a decision is made without consulting the public, the result can never be an informed decision.
18. On whether the petition shall be rendered nugatory if the orders sought are not granted, it was contended that the translocation of Hagarbul sub location will be implemented and effectively the petition shall be rendered nugatory. Reliance to that end was placed on the case of Judicial Service Commission v Speaker of the National Assembly & Another [2013] eKLR where it was held that conservatory orders are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.
19. That the petitioners shall suffer prejudice if the orders herein do not issue as the residents of Hagarbul will be at risk of being exposed to threats of ethnic violence and general insecurity. This court was therefore urged to allow the prayers as sought.
20. From the record, the respondents did not file their submissions.
21. Having considered the pleadings herein, it is clear that the main issue for determination is whether in the given circumstances, a conservatory order ought to issue.
22. The principles guiding grant of conservatory orders in Kenya are well settled. The Supreme Court in Civil Application No 5 of 2014 Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others (supra) discussed, at paragraph 86, the nature of conservatory orders as follows:
 - (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.

23. Conservatory orders therefore are aimed at preserving the substratum of the matter pending the determination of the main issues in dispute.
24. Given the interlocutory nature of conservatory orders, it is often argued that there is need for the court to exercise caution when dealing with any request for such prayers. The rationale being that, matters which are the preserve of the main petition ought not to be dealt with finality at the interlocutory stage. [See the case of [*Centre for Rights Education and Awareness \(CREAW\) & 7 others v Attorney General*](#) (2011) eKLR].
25. The first principle in considering whether conservatory orders ought to issue 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 orders he is likely to suffer prejudice. 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.
26. The third principle is 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 *Nubian Rights Forum & 2 others v Attorney General & 6 others* [2020] eKLR.
27. The question therefore is whether the applicants have satisfied the above conditions.
28. As to the establishment of a *prima facie* case, it need not be a case which must succeed at the hearing of the main case. At least, it must have a likelihood of success. In other words, it has to be shown that a case which discloses arguable issues has been raised and, in this case, arguable constitutional issues. The applicants urged that the 1st respondent did not allow meaningful public participation neither did it give reasons for the relocation of Hagarbul sub location and therefore the said act was ultra vires thus violating the principles of democracy and public participation.
29. The contention is that remedies sought are in light of articles 10,47 and 232 citing establishment of new administrative units contra the provisions of the [*constitution*](#) which have been violated or threatened with violation. That the action by the 1st respondent was ultra vires as the same went against the statutory provisions of the National Coordination Act while also offending on the petitioners right to fair administrative action and legitimate expectation. In my view, the issues raised are critical thus requiring in-depth constitutional interrogation. Allegations of lack of public participation is an issue that can not be dismissed at a preliminary or interlocutory stage. Definitely, a primafacie case has been established.
30. As to whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights, I note that the application/petition is hinged on the allegation on violation of inter alia; articles 1,2,6(2),10,11(1),19,20,21,22(1), 47,73(1), 153,154,174,232,258(1) and 259(1)(b) of the [*constitution*](#). It is trite that the [*constitution*](#) being the supreme law of the republic, the same binds all persons and all state organs at both levels of government. As such, it follows that its provisions must always be upheld.
31. Consequently, every member of the public whether individually or collectively is enjoined to respect, uphold and defend the [*constitution*](#). See *Law Society of Kenya v Officer of the Attorney General & another; Judicial Service Commission (Interested Party)* [2020] eKLR. In my view, it is critical that if there is any allegation however slight it may be in relation to violation of the [*constitution*](#), then the same



must be checked and rectified if need be. As such, a denial of the conservatory order will not enhance the aforesaid constitutional values.

32. The next issue is whether the petition or its substratum will be rendered nugatory if the interim conservatory order is not granted. I am alive to the fact that at this stage, this court is not supposed to examine the merits of the petition. The court's mandate at this stage is to consider whether the applicants have established a *prima facie* case to warrant interim orders so as to secure the substratum of the petition and not to render the petition nugatory and become a mere academic exercise. Having said so and the petitioners having approached this court with the desire to be heard, it is only fair that they be given an opportunity to present their case and be heard in obedience to article 50 of the constitution. To that extent, the petition will be rendered nugatory if the orders sought are not granted
33. As to consideration of public interest and relevant material facts before exercising the discretion on whether or not to grant interim conservatory orders, the court in the case of *Martin Nyaga Wambora v Speaker of The County Of Assembly of Embu & 3 Others* [2014] eKLR observed that, where a conservatory order is sought against a public agency like a legislative assembly that is mandated to carry out certain functions in the normal course of its business, it is only to be granted with due caution. That interruption of lawful functions of the legislative body should take into account the need to allow for their orderly functioning in the public interest. Further, that the court will only issue conservatory orders in exceptional circumstances and will be minded of the mandate of other constitutional organs in exercise of their constitutional mandate.
34. In the instant case, the applicants urged that for the reason that the constitution was not followed despite the same making provisions of the way forward, it was thus in the interest of the public that laws must not only be obeyed but also respected. That given that the public was not involved in any way in coming up with the impugned Gazette Notice No. 1766 Vol. Cxxvi – No. 17, it was mete to allow the orders sought.
35. The petitioners having presented their case carrying along the interests of the people from Fafi and Daadab sub counties, it is my view that it would be in the public interest that the matter be solved on its merits. I say so for the reason that if the same is not done, then the said people may be prejudiced.
36. Having regard to the above, it is my humble view that the applicants herein have satisfied the aforesaid principles in regard to the granting of interim or conservatory orders and as such, the orders that are commendable to me are as follows:
 - i. A conservatory order be and is hereby issued staying the implementation of the impugned Gazette Notice No. 1766 Vol. Cxxvi – No. 17 dated the day of 14.02.2024 only in so far as it relates to the creation of the proposed Hagarbul Sub Location within Dertu Ward under the Fafi Sub County pending the hearing and determination of the petition herein.
 - ii. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 17TH DAY OF MAY 2024

J. N. ONYIEGO

JUDGE

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