



**Loreira & another v Speaker, County Assembly of Baringo & another; Tallam (Interested Party)
(Constitutional Petition E001 of 2024) [2024] KEHC 7528 (KLR) (21 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7528 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CONSTITUTIONAL PETITION E001 OF 2024**

**RB NGETICH, J
JUNE 21, 2024**

BETWEEN

DANIEL TUWIT LOREIRA 1ST PETITIONER

SAM LIMO LOURIEN 2ND PETITIONER

AND

THE SPEAKER, COUNTY ASSEMBLY OF BARINGO 1ST RESPONDENT

BARINGO COUNTY ASSEMBLY 2ND RESPONDENT

AND

**LAWI KIPCHUMBA TALLAM, THE LEADER OF MAJORITY
PARTY INTERESTED PARTY**

(In The Matter Of Contravention Of Fundamental Rights & Freedoms Under The Constitution Of Kenya 2010 Under Articles 1, 3, 10, 19, 20, 21, 22, 23, 28, 47, 50, 165, 174, 181, 196, 258, And 259 And In The Matter Of Contravention Of The County Government Act, 2012 Section 3, 14a, 21, 22, 23, 24, 25, 33, 87(a) And (b), 91 And In The Matter Of Abuse Of Administrative Action Contrary To Article 47 Of The Constitution Of Kenya And Section 5 Of The Fair Administrative Action Act No.4 Of 2015 And In The Matter Of The Contravention Of The Objects Of Devolution As Provided Under Articles 174 Of The Constitution Of Kenya 2010 And In The Matter Of The Contravention Of The Leadership And Integrity Principles As Provided Under Articles 73 Of The Constitution Of Kenya, 2010 And In The Matter Of Contravention Of Public Participation, Rules Of Law And Democracy In The County Assembly Affairs As Provided Under Articles 10 And 196(1) Of The Constitution Of Kenya, 2010 And In The Matter Of Rules 13 And 19 Of The Constitution Of Kenya (protection Of Rights And Fundamental Freedoms) Practice And Procedure Rules, 2013)



RULING

1. The petitioner has moved this court vide a petition dated 24th April, 2024 in the petition, the petitioner is seeking interim orders as follows:-
 - b. Spent.
 - c. That pending the hearing and determination of this application, and the entire petition conservatory order does issue suspending committee on selection report on review of members in various committee dated 16th April, 2024 purporting to reconstitute membership of various house committees and the purported reconstituted committee be barred from holding any sittings, incurring any expenditure as allowances or otherwise or in any other way howsoever, carrying out the mandate designated or reserved for the committees under Baringo County Assembly Standing orders.
 - d. That in alternative to prayer 2 above, an order of status quo ante existing prior to the reconstituted list as forwarded vide the impugned report dated 16th April, 2024 be maintained pending the hearing and determination of this petition.
 - e. That pending the hearing and determination of the petition, an order does issue in terms of Section 6 and 11 of the *Fair Administrative Action Act* compelling the Respondents jointly and or severally to supply the petitioner with written reasons for their decision to reconstitute the various sector committee without their involvement.
 - f. That costs of this petition be provided for.
 - g. Such other relief as the Court may deem fit to grant.
2. This petition is premised on the ground that the impugned decisions of the Respondents in cohort with the interested party in generating and adopting the impugned list on review of members in various committees within the County Assembly of Baringo, which actions was achieved illegally, unprocedurally and in total breach of *the Constitution*, the Baringo County Assembly Standing Orders, the County Assembly Act and the Fair Administrative Actions Act.
3. The petitioner's argument is that their signatures were forged and appended on the said committee on selection report albeit illegally and criminal proceedings have since been activated.
4. That the majority leader arrogated himself powers and purported to alter the list of the minority party leader without the consent or approval of the minority leader or minority party.
5. That the committee on selection Report disregarded the provisions of the Baringo County Assembly standing orders by illegally increasing membership of the budget and Appropriations committee from 9 to 11.
6. That the majority leader usurped powers of the salaries and remuneration commission by purporting to illegally increase the number of sectorial and standing committee of the county assembly; that the illegal changes supervised by the majority leader in the house committee were executed on 16th April, 2024 which culminated to the generation of unwarranted report on review of members in various committees which was achieved and generated hastily and mischievously resulting in violation of Baringo County standing order 239 on amendments of standing orders amongst others.



7. That the interested party introduced the motion in respect to the impugned report without posting it in the assembly order of business and hurriedly passed it without public participation contrary to the mandatory provisions of Articles 10 and 196 of the Constitution of Kenya, Section 3(f), 87 and 91 of the County Assembly Act.
8. That the respondents failed to observe Standing Orders 37, 192, 196 and 239 of the Baringo County Assembly and the actions of the interested party with the blessings of the Respondents were ultra vires for usurping the powers of minority leader illegally and contrary to the constitution and the standing orders.
9. The petitioners stated that the purported biased, selective, illegal capricious, prejudicial and partisan decisions of the Respondents in cohort with the majority leader has deprived the petitioners and their electorates their constitutional mandates as the minority party in the county assembly effectively and if the interim orders sought herein are not granted, they are likely to suffer irreparable harm and damage that cannot be remedied in any other known way.

Response By Interested Party

10. In response, the interested party filed notice of preliminary objection dated 29th April, 2024. The respondents did not file any response. The grounds by the interested party are as hereunder:-
 - i. This petition is incurably defective as it offends Rule 5 as read with Rule 15 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 in that Lawi Kipchumba, the Leader of the Majority party and the chief protagonist herein has been joined as an interested party instead of as the main Respondent.
 - ii. The Petitioners herein have no cause of action as against the 1st and 2nd Respondents and they have been enjoined and sued in order to unprocedurally secure orders against the interested party.
 - iii. The conservatory orders sought cannot be lawfully granted as the Petitioners have not either sought to quash the Report of the Committee nor the Resolution of the 2nd Respondent.
2. The Application was canvassed by way of written submissions.

Petitioner's Submissions

11. The petitioners argue that the petition as lodged is arguable with high probability of success in that the signature of the minority leader as well as the petitioners herein were forged in endorsing the impugned report of the committee on selection of members in various sectoral committees.
12. Further that the impugned report was hurriedly passed without public participation contrary to the mandatory provisions of Articles 10 and 196 of the Constitution of Kenya, Section 3(f), 87 and 91 of the County Assembly Act, and the Fair Administrative Actions Act and the proceedings that gave rise to the impugned report were conducted illegally and in contravention of Standing Order 37 of the Baringo County Assembly.
13. That the actions of the Respondents in sanctioning the discussion and amendments either by increasing the membership and or introducing new house committees as captured in the impugned report complained herein contravened Baringo County Assembly Standing Order 192, 196 and 239 ultimately rendering it wholly null and void ab initio.



14. That the Principles of separation of powers does not allow the Majority leader to de whip members of the Minority Party and unilaterally distribute them in various committees without the consent of the Minority Party.
15. That from the foregoing, it is clear that the petition is arguable and the probability shifts in granting the conservatory orders sought pending the hearing and determination of the petition.
16. That it is also in public interest that a conservatory order be issued to protect and preserve public funds from wastage by illegal entities and further that non issuance of conservatory orders at this juncture is likely to render the lodged petition nugatory despite clear indication of extremely high probability of success.
17. The petitioners submit that vide its Notice of Preliminary Objection dated 29.04.2024, the Interested Party sought that the Petition herein and the Application be dismissed but a close scrutiny of the provisions of Rule 5 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules 2013, the rules states the procedure that shall apply with respect to addition, joinder, substitution and striking out of parties. That additionally, Rule 15 is all about replying to the petition and that it does not apply herein and argue that the Interested Party seemed to have misinterpreted the same.
18. That clearly, the Interested Party has not raised any pure Point of Law to warrant the intervention of the Honourable court and Rule 5 Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules 2013, gives the Judge a wide discretion in matters joinder and non-joinder of parties in a constitutional petition and argue that a petition cannot merely be defeated on a flimsy ground of joinder and or non-joinder of a party. That paragraph 1 of the Preliminary Objection is devoid of merit; that it is mischievously orchestrated to abuse due process of the law and a wicked attempt by the Interested Party to delay the petitioners from their legitimate quest to seek justice.
19. That further ground 2 of the Preliminary Objection does not qualify to be ventilated as Preliminary Objection; that is a mockery of the process, that the Interested Party seems to be speaking in place of the Respondents whereas they have not instructed him to do so or have express instructions to act for them; and submit that the Preliminary Objection herein as crafted is tantamount to chasing a wild mongoose in the darkness and flies in the face of the established rules of Preliminary Objection.
20. On argument that conservatory orders cannot be lawfully granted when orders to quash the report of selection committee has not been advanced, counsel submit that this is a factual element but not a point of law and any unconstitutional decision or proceeding that is in conflict with *the constitution* is a candidate for nullification of the said decision and *the constitution* gives this court discretion to grant the prayers sought in the petition and or order otherwise to protect the rights of the parties aggrieved and submit that quashing is a legal term that majorly applies in Judicial Review proceedings and constitutional petition cannot be defeated on ground of inclusion or non-inclusion of a prayer and submit that the case of Anarita Karimi Njeru v Republic (No.1)-[1979] .KLR 154 is the established precedent and there is no other universally acceptable threshold beyond this.
21. Counsel further rely on the case of Mukisa Biscuits Manufacturing Ltd -vs-West End Distributors (1969) EA 696 where the court stated what constitute a Preliminary Objection and submit that intested party's Preliminary Objection is premature for failing to point out the pure points of law contravened in instituting the petition and the application herein and urge this court to strike out the preliminary objection with costs to the petitioners and allow their application a prayed.



22. Counsel further urge this court to consider the precedent set forth in the case of *Makumi & 4 others – v- Speaker County Assembly of Kitui & another (Constitutional Petition E001 of 2024)* [20241 KEHC 2812 (KLR)] (19 March 2024) Neutral citation: [20241 KEHC 2812 (KLR)].

Interested Party's Submissions

23. The interested party argue that the interested party herein is the true Respondent as the dispute is between him and the other MCA's and the Petitioners rather than between the Petitioners and the two Respondents cited and submit that in its current form, no conservatory orders can be lawfully issued.
24. That from the pleadings and affidavit of the petitioners, the 1st and 2nd Respondents did not wrong them in any way and they cannot therefore be Respondents in this matter and submit that the county assembly and its speaker have been mischievously joined as Respondents in order to enable the grant of orders against parties who do not that have the motivation to defend the case and have nothing to loose if orders sought are granted and submit that this is clear abuse of court process and subversion of the rules of procedure.
25. The Interested party further submit that whereas the Petitioner seek 7 prayers in the Petition, there is no prayer of certiorari to quash the Report that has aggrieved them and in the absence of such prayer, there is no basis upon which this court can grant any of the prayers sought in the notice of motion.
26. In respect to prayers sought in the Notice of motion, the interested party argue that the Petitioners have not made a case for the grant of reliefs sought and relied on the case of *Gatirau Peter Munya Vs Dickson Mwenda Kithinji and 2 others (2011)eKLR* where the supreme court summarized the principles for grant of conservatory orders.
27. And an objective application of the said principles will lead to the compelling conclusion that the orders sought should not be granted on account that the Petition as pleaded is so defective for failure to sue the proper Respondents and the petition herein cannot be rendered nugatory as the new committees can always be removed in the event that the petition is allowed and public interest in the matter will be best served by allowing the reconstituted committees to continue discharging their mandate particularly because on a prima facie basis, there is no evidence that any illegality was committed during the process of reconstituting the committees.
28. The interested party further relies on the case of *Muslim for Human Rights (Muhuri) & 2 others Vs. Attorney General & 2 others (2011) eKLR* where the court stated that a court dealing with an application for conservatory orders must maintain the delicate balance of ensuring that it does not delve into issues which are in the realm of the main petition and submit that the substantive issues in this matter can only be ventilated during the hearing of the Petition; that at this stage this court cannot safely and fairly delve into these issues without prejudicing the interested party herein.
29. The interested party further relied on case of *Mohammed Fugicha Vs Methodist Church of Kenya* where the supreme court of Kenya held inter alia that an interested party cannot file a cross petition. That in this case, the interested party is the substantive Respondent yet in being joined as the interested party, the petitioners have curtailed some of his procedural rights including filing of a cross petition; and urged this court to dismiss with costs the Notice of motion dated 24th April,2024.

Analysis And Determination

30. Upon considering the grounds of the Petitioner's Notice of Motion dated 24th April, 2024, Respondents' Preliminary Objection, averments herein and submissions filed together with oral highlighting of written submissions, I consider the following as issues for determination:-



- i. whether the preliminary objection should be upheld
 - ii. whether the application has met threshold for grant of conservatory relief
 - (i) Whether the Preliminary Objection should be upheld
31. The interested party argues that the true party the petitioner should have sued is the interested party as the dispute is between him and the other members of County Assembly (MCA's) and in the petition's current form, no conservatory orders can be lawfully issued.
 32. The petitioners on their part argue that the Interested Party has not raised any pure Points of Law to warrant the intervention of this court as Rule 5 of Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules 2013, gives this court wide discretion in matters joinder and non-joinder of parties in a constitutional petition and a petition cannot be defeated on flimsy ground of joinder and or non-joinder of a party and the preliminary objection is abuse of court process and is intended to delay the petitioners' legitimate quest to seek justice.
 33. The 'Mutunga Rules', *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, Legal Notice No. 117 of 2013, defines an interested party as;

“A person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation”
 34. The Rules further at Part II Clause 7 provides that, a person with leave of the Court may make an oral or written application to be joined as an interested party or the Court, on its own motion, may also join an interested party to the proceedings before it.
 35. From the court record, it is evident that there was no leave of court sought by the Interested Party to be enjoined in this suit. It is the petitioner/Applicant who joined the interested party to these proceedings suo motto.
 36. In the case of *Meme v. Republic*, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:-
 - (i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
 - (ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
 - (iii) joinder to prevent a likely course of proliferated litigation.”
 37. From the pleadings herein, the interested party has been named as the chief protagonist of the impugned report. I agree with the interested party's argument that the petitioner ought to have sued him as the Respondent in the matter rather than enjoining him as the interested party. However in my view, this is procedural technicality which should not defeat the course of justice .I associate with the reasoning of Mwongo J, in *Kenya Ports Authority V Kenya Power & Lighting Co. Limited* (2012) eKLR that procedural technicality is a lapse in form that does not go to the root of the suit. In view of the above, I see no merit in the Preliminary Objection and dismiss accordingly.
 - (ii) Whether the application has met threshold for grant of conservatory relief



38. The law on conservatory orders is now well settled in this jurisdiction and is backed by myriads of authorities. In *Centre for Rights Education and Awareness (CREAW) & another v Speaker of the National Assembly & 2 others* (2017) eKLR the Court was emphatic that:-

“A party who moves the court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation; are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending case or Petition.”

2. Article 23(3) of *the Constitution* provide that in any proceedings brought under Article 22, a Court may grant appropriate relief including a Conservatory Order and Article 22(1) of *the Constitution* provide that every person has a right to institute Court proceedings claiming that a right or fundamental freedom in the Bill has been denied, violated or infringed or is threatened.

39. Article 23 of *the Constitution* of Kenya as read with the provisions of Article 165 and Rule 23 of *the Constitution* of Kenya (Protection of rights and Fundamental Freedom) Practice and Procedure Rules, 2013, (otherwise referred to as “the Mutunga Rules”) empowers this court to hear and determine an application for conservatory order or interim orders in order to secure the subject matter in dispute. Rule 23 of the Mutunga Rules provides:-

“1) Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim order.”

40. The principles in regard to the granting of interim or Conservatory Orders were outlined by the Supreme Court in the case of *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others*, Supreme Court Application NO. 5 of 2014 (2014) eKLR, where the Court held that:-

(85) These are issues to be resolved on the basis of recognizable concept. The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of “stay orders” is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.

(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 supplicant’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.”

41. In view of the above, the principles required to be satisfied before granting Conservatory Orders or Interim Conservatory Orders comprises of the following:-



- a) First, an Applicant must demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.
 - b) The second principle is 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.
 - c) Thirdly, the court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.”
 - d) The final principle for consideration is whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.
42. In view of the above, I have considered pleadings and arguments herein. The petitioner’s argument is that the signature of the minority leader and the petitioners herein were forged and the list of minority leader was therefore altered without his consent. The petitioners have indicated that complaint has been lodged with EACC and DCI. The findings of their investigations are yet to be out. However, this is an issue which should be dealt with in the hearing of the petition. The interested party has argued that in the event the petition is allowed, the new committees will be removed and the petition will not be rendered nugatory. I however do not agree with the interested party’s argument as the additional committees and additional members in committees has cost implication which in my view is improper use of public resources.
43. There is also allegation that proceedings that gave rise to impugned report were conducted illegally and in contravention of Standing Order 37 of Baringo County Assembly. At this stage I am alive to the fact, that the Court should not go into the merits of the Petition but has to consider whether the Petitioner, has established a prima facie case to warrant grant of Interim Orders sought to secure the substratum of the suit and not to render the petition herein nugatory and become a mere academic exercise.
44. From the foregoing, the petitioners have demonstrated that it would be in the interest of justice and public interest to protect the substratum of this petition.
45. From the foregoing, I do order that status quo ante existing prior to the reconstituted list forwarded by majority leader vide impugned report dated 16th April 2024 to be maintained pending hearing and determination of this petition.

Final Orders:

- a. Preliminary Objection is hereby dismissed.
- b. Prayer C of the Petitioner’s application dated 24th April, 2024 is hereby allowed.
- c. Costs in the cause.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 21ST DAY OF JUNE 2024.

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RACHEL NGETICH
JUDGE

In the presence of:

- Mr. Kiptoo for Petitioners.
- Ms. Lagat & Mr. Mungai for the Interested Party.



Court Assistant: Elvis.

