



REPUBLIC OF KENYA



KENYA LAW
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**Tulaga Farmers Co-operative Society Limited & another v County Government of Nyandarua
& 2 others (Petition E009 of 2023) [2024] KEHC 7507 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7507 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
PETITION E009 OF 2023**

CM KARIUKI, J

JUNE 20, 2024

**IN THE MATTER OF ARTICLES 1,2,3,10, 19,20,21,22 (1) (2) (B),
23 (1) (3), 27,47,48, 159 (1)(2) AND (E) AND 165 (3) (A), 185, 196,
199, 209 AND 210 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES
27, 47 (1) AND 48 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF SECTION 87 OF THE
COUNTY GOVERNMENTS ACT NO. 17 OF 2012**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION
OF THE NYANDARUA COUNTY FINANCE ACT, 2023**

AND

**IN THE MATTER OF THE ALLEGED VIOLATION OF THE RIGHT
TO PROPERTY, ACCESS TO JUSTICE, FAIR HEARING, PUBLIC
PARTICIPATION, EQUALITY AND FREEDOM FROM DISCRIMINATION**

BETWEEN

TULAGA FARMERS CO-OPERATIVE SOCIETY LIMITED 1ST PETITIONER

MUKI FARMERS CO-OPERATIVE SOCIETY LIMITED 2ND PETITIONER

AND

THE COUNTY GOVERNMENT OF NYANDARUA 1ST RESPONDENT

THE COUNTY ASSEMBLY OF NYANDARUA 2ND RESPONDENT



RULING

1. The Petitioners filed a petition dated 7th August 2023, and contemporaneously with the petition, they filed a notice of the petition on an even date supported by the affidavit of Geoffrey Ndungu Moko and William Mwangi Wambugu sworn on an even date seeking that: -
 - i. Spent
 - ii. Pending the hearing and determination of this application, the honorable court will be pleased to grant an order of temporary injunction restraining the 1st Respondent from attaching, alienating, seizing, and confiscating or in any other manner interfering with the Petitioner's assets or any other aspect of their business.
 - iii. Pending the hearing and determination of the petition, the honorable court will be pleased to grant an order of temporary injunction restraining the 1st Respondent from attaching, alienating, seizing, and confiscating or in any other manner interfering with the Petitioner's assets or any other aspect of their business.
 - iv. Costs of the application are costs in the cause.
2. The application was brought under a certificate of urgency. The honorable court made temporary orders regarding prayers 1 and 2 pending the hearing. The duty judge on 17th August 2023, then sitting at Nakuru, ordered that "pending the hearing and determination of the application inter partes, an injunction is hereby issued against the 1st Respondent from seizing, confiscating, removing or in any manner interfering with the applicant's assets."
3. Upon being served with the pleadings above, the 1st Respondent adopted a two-pronged approach. First, they filed a replying affidavit sworn by Hon. Mary Wanjiku Kamande, dated 7th September 2023, in reply to both the petition and the notice of motion aforementioned, also filed an application seeking the following orders:-
 - a. Spent
 - b. This honorable court should be pleased to discharge, set aside, and vary the exparte orders issued on 17th August 2023 in this matter, pending the hearing and determination of the instant application.
 - c. Upon hearing this application, the honorable court will be pleased to discharge, set aside, and vary the exparte orders issued on 17th August 2023 in this matter, pending the hearing and determination of the instant application.
 - d. The costs of this application and the Petitioners' application dated 7th August 2023 will be borne by the Petitioners.
 - e. Any other order or relief that the honorable court deems just, fair, and expedient.

Petitioner's Submissions

4.



5. The Petitioner began by addressing the application dated 7th September 2023, seeking to set aside or discharge orders issued on 17th August 2023. The said application is based on the 15 grounds set out in the motion and the annexed affidavit of Hon. Mary Wanjiku Kamande.
6. Briefly, the Petitioner stated that the 1st Respondent, through its application, stated that unless this court intervenes, the issuance of ex parte orders will occasion a fundamental miscarriage of justice. It further claims that the Petitioners failed to bring the honorable court's attention and appreciate the magnitude to which the said orders would affect, halt, or hinder the daily functions of the county government and, in turn, affect service delivery to its constituents. That the Petitioners' application and impugned orders granted were based on falsehoods that the 1st Respondent had seized, confiscated, removed, and interfered with the Petitioners' assets.
7. Reliance was placed on Kenya Electricity Transmission Company Limited vs. Kibotu Limited [2019] eKLR, National Commercial Bank Ltd vs. Olint Corporation [2009] IV/r 1405 & St. Patrick's Hill School Ltd vs. Bank of Africa Kenya Ltd [2018] eKLR.
8. The Petitioner asserted that the main issue for determination is whether the 1st Respondent is entitled to orders of discharge of injunction. Further, that the 1st Respondent has applied for conservatory orders to allow it to collect milk cess from the Petitioners in enforcement of the impugned statute, it was averred that the grant of interlocutory injunctions is not meant to occasion prejudice to any party. In this case, the 1st Respondent could be compensated by damages if the court finds that the Petitioners did not deserve the grant of injunction. The damages can be quantified and are monetary, which can be granted if the petition fails.
9. Order 10 Rule 7 of the Civil Procedure Rules, Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 Others, Gatirau Peter Munya Vs. Dickson Mwenda Kithinji and 2 Others
10. It was pointed out that the other issue relevant to this case is whether the Petitioners obtained the interlocutory orders of injunction by non-disclosure of material facts and misrepresentation of facts. They submitted that the 1st Respondent has not sufficiently demonstrated that it is entitled to the discharge of the injunction. It has not proved that the injunction does not serve the ends of justice it was intended to serve when it was issued.
11. The Petitioners asserted that from the material on record, no real danger has been demonstrated to warrant the discharge of the orders earlier granted. The honorable court cannot ascertain whether sufficient public participation was involved before the impugned statute was enacted at this stage. That oral evidence would have to be called before the honorable court can be in a position to make an informed decision that will serve the ends of justice.
12. Lastly, it was stated that the 1st Respondent has not demonstrated that it has suffered from non-disclosure of material facts. It did not state the material facts that were not disclosed. It would, therefore, be in the interest of justice to order that the order of injunction be in place pending the hearing and determination of the petition. The discharge or varying of the injunction would not be appropriate at this stage.

1st Respondent's Submissions

13. ...
14. The 1st Respondent submitted that the court ought to consider the following as the issues for determination:-



- I. Whether there was material non-disclosure on the part of the Petitioners and
 - II. If so, whether the 1st Respondent's application is merited?
15. On the first issue, the 1st Respondent asserted that the Petitioners misrepresented to the court that the Respondent had been seizing, confiscating, removing, and interfering with their assets. Further, the 1st Respondent had only raised invoices in August 2023, granting the Petitioner more than the 21 days they had requested to convene an SGM between November and December.
 16. The 1st Respondent averred that the Petitioners also misrepresented that the 1st Respondent had failed to carry out sufficient public participation. It was stated that sufficient evidence had been produced of the extent of public participation by the Respondents. Even assuming arguendo, the Act is backed by legislations that are prima facie legal and presumed to be constitutional, so the Petitioners have not challenged the constitutionality of the underlying statutes.
 17. It was argued that dairy and milk, being components of agriculture, fall within the county government's function as demarcated under Section 1 Part 2 of the Fourth Schedule to *the Constitution* of Kenya. Additional reference was made to Section 7(e) Part 2 of the Fourth Schedule, Article 185 (2) of *the Constitution* as read together with the *County Governments Act*, 2012, *Dairy Industry Act*, Cap 336 Laws of Kenya, and the subsidiary legislations therein being the Dairy Industry (Registration, Licensing, Cess And Levy) Regulations, 2021, the regulations herein and Regulation 12.
 18. The 1st Respondent contended that the Petitioners had not challenged the constitutionality of the anchor legislation, which was *the Constitution* of Kenya, the *County Governments Act*, 2012, and the *Dairy Industry Act* on the power to impose cess fees. The import of such failure is detrimental to the petition and the prayers they seek. Reliance was placed on the vase of Jacob Kyule and 2 Others (Suing on behalf of Machakos Bar & Hotel Owners Welfare Self Help Group; Simon Kioko Kitheka (Suing on behalf of Kenya National Chamber of Commerce and Industry, Machakos County vs County Government of Machakos [2019] eKLR.
 19. Regarding the second issue, it was pointed out that the Nyandarua Finance Act, 2023, is a revenue collection act. It was stated that the case of Kenya Electricity Transmission Company Ltd vs. Kibotu Limited [2019] eKLR and St. Patrick Hill School Ltd vs. Bank of Africa Kenya Ltd [2018] eKLR relied on by the Petitioners in support of not setting aside the injunctive orders in place do not relate to a Finance Act of any nature of kind.
 20. They submitted that guidance on how to treat Finance Act provisions could be found in the case of Cabinet Secretary for the National Assembly & Another vs Okiya Omtatah Okoiti & 12 Others. It was stated that public interest in the interim is for implementing the Nyandarua Finance Act, 2023, and the constitutional imperatives would be against the orders sought. As per the COA, the Petitioners can get a rebate for the overpaid taxes and levies when making subsequent tax payments; hence, no prejudice will be occasioned.

Analysis and Determination

21.
22. I have considered the Petitioners' application dated 7th August 2023 and the 1st Respondent's application dated 7th September 2023, the Replying affidavits thereto, the parties' rival submissions, and from applications the issues that arise for consideration is whether the Petitioners and the 1st Respondent are entitled to the orders sought in their respective applications.



23. The Petitioners asserted that the main issue for determination is whether the 1st Respondent is entitled to orders of discharge of injunction. They stated that in this particular case, the 1st Respondent would be able to be compensated by way of damages if the court finds that the Petitioners did not deserve the grant of injunction. They argued that the 1st Respondent has not sufficiently demonstrated that it is entitled to the discharge of the injunction. It has not proved that the injunction does not serve the ends of justice it was intended to serve when it was issued.
24. The Petitioners argued that the 1st Respondent has not demonstrated that it has suffered from non-disclosure of material facts. It did not state the material facts that were not disclosed. It would, therefore, be in the interest of justice to order that the order of injunction be in place pending the hearing and determination of the petition.
25. The 1st Respondent asserted that the Petitioners misrepresented to the court that the Respondent had been seizing, confiscating, removing, and interfering with their assets. Further, the 1st Respondent had only raised invoices in August 2023, having granted the Petitioner more than the 21 days they had requested to convene an SGM between November and December; they also averred that the Petitioners also misrepresented that the 1st Respondent had failed to carry out sufficient public participation and that the Act is backed by legislations that are prima facie legal; and presumed to be constitutional that the Petitioners have not challenged the constitutionality of the underlying statutes.
26. It was stated that the Nyandarua Finance Act, 2023 is a revenue collection act. Therefore, public interest in the interim is for implementing the Nyandarua Finance Act, 2023, and the constitutional imperatives would be against the orders sought. As per the COA, the Petitioners can get a rebate for the overpaid taxes and levies when making subsequent tax payments; hence, no prejudice will be occasioned.
27. Accordingly, having gone through each party's arguments, I will deal with the two applications together. Firstly, the 1st Respondent alleged that the injunction orders should be discharged because of material non-disclosure on the Petitioners' part. They averred that the Petitioners had misrepresented the fact that the 1st Respondent had failed to carry out sufficient public participation and that the Act is backed by legislations that are prima facie legal and presumed to be constitutional. In my opinion, the same is an issue to be decided on in the main petition, and I, therefore, cannot determine whether the Petitioners misrepresented the issue of public participation being conducted at this stage.
28. Moreover, the 1st Respondent stated that the Petitioners had misrepresented to the court that they had been seizing, confiscating, removing, and interfering with their assets. They stated that they had only raised invoices in August 2023, granting the Petitioner more than the 21 days they had requested to convene an SGM between November and December. Upon a thorough perusal of the Petitioners' application, they found the application on the grounds that:-
 - I. "That the 1st Respondent has illegally and unlawfully seized and/or intends to seize assets belonging to the Petitioners" herein in purported enforcement of the impugned Nyandarua County Finance Act, 2023
 - II. That the 1st Respondent has been and is harassing and intimidating employees, servants, and agents of the Petitioners to extort money from them in further purported enforcement of the impugned statute.
 - III."
29. The Petitioners allege that the 1st Respondent had seized and intended to seize their assets to enforce the impugned Act. Therefore, the Petitioners were in imminent danger that their assets would be



seized and confiscated by the 1st Respondent. Additionally, they stated that their employees, servants, and agents had been harassed and intimidated by the 1st Respondent in the view of extorting money. Accordingly, I find that there was no material non-disclosure. Any such apparent non-disclosure was innocent on the Petitioners' part as they indicated that they believed the 1st Respondent was seizing and confiscating their assets in purported enforcement of the impugned Nyandarua County Finance Act, 2023.

30. At this point, I would like to clarify that the Petitioner's application sought temporary injunction orders restraining the 1st Respondent from attaching, alienating, seizing, and confiscating or in any other manner interfering with the Petitioner's assets or any other aspect of their business pending the hearing and determination of this application and the petition. The court granted the ex parte orders that, pending the hearing and determination of the application inter partes, an injunction is hereby issued against the 1st Respondent from seizing, confiscating, removing, or interfering with the applicant's assets. Which ex parte orders did the 1st Respondent apply to have discharged, set aside, or varied?
31. Accordingly, what is before the court is not conservatory orders on the collection of the milk cess from the Petitioners but the discharge of the ex parte injunction orders relating to attaching, alienating, seizing, and confiscating or in any other manner interfering with the Petitioner's assets or any other aspect of their business issued on 17th August 2023 which in my opinion the Respondents have not sufficiently demonstrated that they are entitled to the discharge of the temporary injunction.
32. In the end, the court makes orders that: -
 - i. The Respondent's application is dismissed forthwith.
 - ii. Pending the hearing and determination of the petition, this honorable court grants an order of temporary injunction restraining the 1st Respondent from attaching, alienating, seizing, and confiscating, or in any other manner interfering with the Petitioner's assets or any other aspect of their business. The duration of this order is set to a maximum of six (6) months. Otherwise, they lapse if the petition will not be concluded.
 - iii. Costs of the application are costs in the cause.

JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 20TH DAY OF JUNE 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

CHARLES KARIUKI

JUDGE

