



Yarrow & another v National Project Coordinator, Kenya Development Response to Displaced Impacts Project(KDRDIP) & 4 others (Constitutional Petition E006 of 2024) [2024] KEHC 7247 (KLR) (14 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7247 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CONSTITUTIONAL PETITION E006 OF 2024**

JN ONYIEGO, J

JUNE 14, 2024

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES 10, 27(1) & (2), 42, 43, 47,69 73 AND 201 OF THE CONSTITUTION OF KENYA

BETWEEN

BISHAR AHMED YARROW 1ST PETITIONER

FARAH HASSAN MOHAMED 2ND PETITIONER

AND

NATIONAL PROJECT COORDINATOR, KENYA DEVELOPMENT RESPONSE TO DISPLACED IMPACTS PROJECT(KDRDIP) 1ST RESPONDENT

COUNTY PROJECT COORDINATOR, KENYA DEVELOPMENT RESPONSE TO DISPLACED IMPACTS PROJECT(KDRDIP) 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

THE MEMBER OF PARLIAMENT FOR FAFI CONSTITUENCY, HON SALAH YAKUB FARAH 4TH RESPONDENT

CABINET SECRETARY MINISTRY OF PUBLIC SERVICE & GENDER 5TH RESPONDENT

RULING

1. The applicants herein moved this court via a notice of motion dated 14.02.2024 seeking for the following orders:

i. Spent.



- ii. The Honourable Court do issue conservatory orders pending the hearing and determination of this application in the following terms:
 - a. The 1st, 2nd and 4th respondents its agents, employees, directors or servants be restrained from forming or nominating members to serve in the community projects management committees for various projects already submitted and approved by it from Fafi constituency in Garissa County for funding.
 - b. The 4th respondent, its agents, employees, directors or servants be restrained from presenting to the 1st and 2nd respondent community groups under livelihood program from Fafi constituency in Garissa County.
 - c. The 1st, 2nd and 5th respondents be directed to withhold and not to release of any funds held in KCB Bank Account Limited to community project management committees for the approved project for financial year 2023/2024 in Fafi constituency.
 - iii. The Honourable Court do issue conservatory orders pending the hearing and determination of this petition in the following terms:
 - a. The 1st, 2nd and 5th respondent, its agents, employees, directors or servants be restrained from forming or nominating members to serve in the community projects management committees for various projects already submitted and approved by it from Fafi constituency in Garissa County.
 - b. The 4th respondent, its agents, employees, directors or servants be restrained from presenting to the 1st and 2nd respondent community groups under livelihood program from Fafi constituency in Garissa County for funding.
 - c. The 1st and 2nd respondents be directed to withhold and not to release of any funds held in KCB Bank Account Limited to community project management committees for the approved project for financial year 2023/2024 in Fafi constituency.
 - iv. The costs of this application be provided for.
 - v. Further or any other relief that the Honourable court might think fit to grant.
2. The application is anchored on the grounds set out on the face of it and further supported by the supporting affidavit of Bishar Ahmed Yarrow the 1st applicant herein. It was deposed that the 4th respondent has formed community projects management committee without the knowledge of social mobilizers and community facilitators which is contrary to the project design and implementation structure. That the 2nd respondent relying on the advice by the 4th respondent, has approved and released funds amounting to Kshs 100,500,000/- which shall be used for the implementation of the first half of the projects slated for the fiscal year 2023 2024.
 3. That the petition raises pertinent questions dealing with financial governance, abuse of fundamental rights of a whole community and very serious issues in regards to leadership and integrity that have a high chance of being approved by the 1st and 2nd respondents. That letting the process to continue would mean that all communities stand to suffer in the altar of greed and criminal enterprise. That the ends of justice would be served best if the conservatory orders sought herein are issued.
 4. The crux of the application herein is that in the year 2017, the government of Kenya entered into an agreement with the International Development Association for financing Kenya as a participating country to assist with projects in respect to Kenya Development Response for Displacement Impacts



- Projects hereinafter, KDRDIP. That KDRDIP was thereafter mandated to be a facilitating partner in Fafi Sub County in conjunction with the Kenyan government who would ensure that structures and processes through which the projects would be allocated and tenders awarded were in place.
5. That the whole process and implementation was to be done through the Community Project Management Committees, hereinafter CPMC whose members were supposed to be from the locality where the said projects are implemented. That in this case, the 4th respondent formed CPMC without public participation from the affected areas. It was averred that the 4th respondent filled the said CPMC with his cronies to the exclusion of locals of the respective areas.
 6. Salah Yaqub Farah, the 4th respondent in his replying affidavit sworn on 22.04.2022 opposed the application urging that he is the current member of the national assembly representing Fafi Constituency within Garissa County. That the petitioners are perennial litigants who have been against development projects initiated within the area. He deposed that the projects being contested are upto 80% complete and the funds already in the respective community projects management committees' accounts. That all world bank funded projects are time bound and the intention of the petitioners is to delay the projects so that ultimately, the funds are recalled once their implementation time is not met.
 7. That granting the orders sought herein will impact negatively the implementation of the ongoing projects thus the community stands to be affected eventually. He denied the claim that Fafi sub county has been disadvantaged and discriminated against. In his view, the petition herein is not only frivolous but also an abuse of the court process.
 8. In opposing the application, state counsel Mr. Macheso for the 1st, 2nd, 3rd and 5th respondents filed grounds of opposition dated 05.03.2024. He urged that the applicants did not take into consideration the doctrine of constitutional avoidance and as a result did not exhaust the mechanism provided for under chapter 11 of the project's manual. Reliance in that respect was placed in the case of *Speaker of National Assembly v Karume* (1992) KLR where the court found that where there is a clear procedure for redress of any particular grievance, then the procedure must be followed. They urged the court to find that this suit has been filed prematurely.
 9. Directions were issued that the application be canvassed by way of written submissions. The applicants via their submissions dated 12.03.2024 contended that they had established a *prima facie* case to warrant grant of conservatory orders. To that end, the court was referred to the case of *Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General*, Nairobi High Court Petition No 16 of 2011 eKLR.
 10. That the *Constitution* of the local project committee was done without the knowledge of the public despite the same affecting very many communities. That as soon as the 4th respondent formed the said committee, it proceeded to propose allocation of funds which if approved by the 1st, 2nd and 5th respondents will unlock the release of funds amounting to Kshs 100,500,00/-
 11. That the 4th respondent is in the process of forming another committee which comprises his cronies so that they can decide which sub county will receive projects and allocation of funds for the second half of the fiscal year. That once he finishes this process, he will then proceed to forward the same to the 1st, 2nd and 5th respondents for release of money. That this will be done without any public participation.
 12. It was urged that the said actions violate the provisions of article 10 and 47 of the *Constitution* and further, the rights of Fafi Constituents. That in the first half budget, the 4th respondent only awarded Fafi Sub County 3 out of 19 projects against the fact that Fafi Sub County is the area which hosts refugees. It was contended that, if the second phase is approved, the Fafi Sub County is likely to suffer irreparably. In the end, this court was urged to allow the prayers sought.



13. The 4th respondent in his submissions dated 22.04.2024 urged that the main issue for determination is whether the applicants have met the threshold for grant of conservatory orders. In that respect, the court was referred to the case of *Gatirau Peter Munya v Dickson M Wenada Kitbinji & 2 others* [2014] eKLR, where it was held that conservatory orders 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.
14. It was further urged that the questions raised in this petition are not only ambiguous but also groundless as the same were not anchored in any known constitutional provision. The allegations that the 4th respondent has been registering community projects management committees are wild allegations and even if they were true, they would not be a ground for constitutional petition. That the applicants have not put forward a satisfactory argument that the petition will be rendered nugatory if the orders sought herein are not issued.
15. It was contended that the court had an onerous task of balancing between the competing interest of the public as highlighted by the opposing sides vis a vis personal interest. On the other hand, it was argued that if the process is halted, the unexpended funds will have to be returned to the bank at the close of the financial year. That the Fafi community will lose if the orders are granted and funds returned and subsequently the petition fails.
16. The 1st, 2nd, 3rd and 5th respondents in their submissions dated 13.03.2024 framed two issues for determination as follows; whether the petitioners exhausted existing dispute resolution mechanism outside the court and; whether this court can issue conservatory orders as sought by the petitioners.
17. It was urged that the petitioners/applicants having not exhausted the available dispute resolution mechanism as provided for in the project manual, the court cannot assume jurisdiction prematurely under the doctrine of exhaustion. To that end, reliance was placed in the case of *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* Petition 14A, 14B and 14C of 2014 of [2014] eKLR where the court held that the doctrine of avoidance entails that a court will not determine a constitutional issue when a matter may properly be decided on another basis.
18. On the second issue, the 1st, 2nd, 3rd and 5th respondents urged while relying on the case of *Wilson Kaberia Nkunja and Judges Vetting Board & another* [2016] eKLR that a conservatory order would only issue where there is a real impending danger to violation of the *Constitution* or fundamental rights and freedoms with a consequence that a petitioner or public at large would suffer prejudice unless the court intervenes.
19. That in the instant case, to withhold the release of any funds to community project management committees for an approved project meant to better lives of residents of Fafi constituency, would go against the letter and spirit of the *Constitution*. That the balance of convenience should be tilted in favour of services in the community hence the orders sought herein should not issue.
20. I have considered the application herein, the response by the respondents and rival submissions by all parties. The main issue for determination is whether or not conservatory orders sought should issue.
21. It is trite that before a conservatory order can issue, the applicant must establish existence of a prima facie case. See *Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General*, Nairobi High Court(*supra*) where the court held that;

“ At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory



order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution”

22. A conservatory order is a judicial remedy issued by a court to preserve a subject matter until the suit is heard and determined. It is in other words an order of *status quo* so that the substratum of the suit is preserved so that the same is not rendered an academic exercise or better still nugatory.
23. At the interim stage, the court must navigate a thin line by avoiding to delve into the merits of the suit before hearing the parties while at the same time, maintain the substratum of the suit at the interim stage. The principles for consideration before granting a conservatory order were unequivocally pronounced by the supreme court in Gatirau Peter Munya(*supra*) already highlighted. The question is whether the applicants have satisfied the requirements set out in this case.
24. As to the establishment of a *prima facie* case with a likelihood of success, the same need not be a case which must succeed at the hearing of the main case. In other words, it has to be shown that it is a case which discloses arguable issues in this case, arguable constitutional issues.
25. In the instant case, the applicants urged that the 4th respondent did not allow meaningful public participation for he has chosen his cronies in the committee. Further, that he acted beyond his mandate thus contravening articles 10 and 47 of the Constitution.
26. The respondents did deny constituting the impugned committee without involving the community. Indeed, Article 10 is the cornerstone of public participation and therefore the role of the community in determining who bears responsibility in managing community project funds is critical hence a constitutional issue which can be instituted any person under Article 22 of the Constitution. In my view, it would be important to determine the allegations set out in the petition which I find to be arguable. As such, I find that a *prima facie* case has been established by the applicants herein.
27. 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 is hinged on the allegation of-violation of articles 27(1) (2), 42,43 and 47. It is trite that the Constitution being the supreme law, the same binds all persons and all state organs at both levels of government.
28. In my view therefore, it is critical that if there is any allegation however slight it may be in relation to the violation of the Constitution, the same must be checked and rectified if need be. As such, a denial of the conservatory orders will not enhance the aforesaid constitutional values. See Law Society of Kenya v Officer of the Attorney General & another; Judicial Service Commission (Interested Party) [2020] eKLR.
29. As to whether the petition will be rendered nugatory if the interim conservatory orders are not granted, I will have to consider the primary concern and purpose in filing the petition herein which is the preservation of funds before determination of the petition. I am alive to the fact that at this stage, this court is not supposed to examine the merits of the petition but has to consider whether the applicants have established a *prima facie* case to warrant issuance of interim orders so as to secure the substratum of the petition and not to render the petition nugatory. The applicants having urged the need to be heard, it is my view that an opportunity ought to avail to them in recognition of article 50 of the Constitution.
30. As to consideration of public interest, 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. Noting that the applicants have presented their case and the same is noted to carry along the interests of the people from Fafi Sub County, it is my view that it would be in their 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 if it were later found that the 4th respondent acted in excess of his powers. As such, I find that this limb was equally met.

31. Regarding the claim that the petitioners did not exhaust the existing dispute resolution mechanism under the KDRDIP manual clause 4.1, the same made reference to the *Intergovernmental Relations Act*. A look at sections 32-34 of that *Act*, reveals that disputes between the national government and county government/s or between county governments shall be resolved internally before going to court. The petitioners are not a government for that *Act* to apply. On that ground alone, that prayer fails.
32. Having taken into account the totality of the circumstances surrounding the suit herein, the scales of justice does tilt in favour of the applicants. In my humble view, the applicants herein have satisfied the aforesaid principles in regard to the granting of interim or conservatory orders and as such, I allow prayer 3 (a) (b) (c) as prayed. The orders shall be in place pending hearing and determination of the petition herein.

DATED, SIGNED AND DEFILED VIRTUALLY THIS 14TH DAY OF JUNE 2024

J. N. ONYIEGO

JUDGE

