



**Mohamed & 8 others v Speaker Wajir County Assembly & 3 others (Petition E014 of 2024) [2024] KEHC 10711 (KLR) (16 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10711 (KLR)

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

**PETITION E014 OF 2024**

**JN ONYIEGO, J**

**SEPTEMBER 16, 2024**

**IN THE MATTER OF: ARTICLES 1, 2, 3, 6, 10, 48, 74, 174, 179, 185,  
196, 201, 228, 232, 258(1) AND 259(1) OF THE CONSTITUTION 2010**

**AND**

**IN THE MATTER OF: SECTIONS 6A, 8, 9 & 21 OF THE COUNTY GOVERNMENTS ACT**

**AND**

**IN THE MATTER OF MEMBERS OF THE COUNTY ASSEMBLY OF WAJIR**

**AND**

**IN THE MATTER OF WAJIR COUNTY APPROPRIATION BILL 2024**

**AND**

**IN THE MATTER OF; UNCONSTITUTIONAL, UNFAIR & OPAQUE APPROVAL OF  
WAJIR COUNTY PROGRAM BASED BUDGET FOR THE FINANCIAL YEAR 2024/2025**

**BETWEEN**

**HON ABDIKADIR DUBOW MOHAMED ..... 1<sup>ST</sup> PETITIONER**  
**HON IBRAHIM HUSSEIN ..... 2<sup>ND</sup> PETITIONER**  
**HON YUSSUF HUSSEIN ..... 3<sup>RD</sup> PETITIONER**  
**HON SANAL MOGOW ..... 4<sup>TH</sup> PETITIONER**  
**HON FATUMA FILE ..... 5<sup>TH</sup> PETITIONER**  
**HON AMINA IBRHAIM ..... 6<sup>TH</sup> PETITIONER**  
**HON ABDI MOHAMED ..... 7<sup>TH</sup> PETITIONER**  
**HON MOHAMMED IBRAHIM ..... 8<sup>TH</sup> PETITIONER**  
**HON YUSUF MOHAMED ..... 9<sup>TH</sup> PETITIONER**



## AND

**THE SPEAKER WAJIR COUNTY ASSEMBLY ..... 1<sup>ST</sup> RESPONDENT**  
**THE CLERK, WAJIR COUNTY ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT**  
**THE CECM FINANCE, WAJIR COUNTY ASSEMBLY ..... 3<sup>RD</sup> RESPONDENT**  
**THE CONTROLLER OF BUDGET ..... 4<sup>TH</sup> RESPONDENT**

## RULING

1. Vide a petition dated 6<sup>th</sup> August, 2024, the petitioner sought declaratory orders as follows;
  - i. A declaration be and is hereby issued that the national values stipulated in Article 10 of the Constitution and principles of public service set out in Article 232 of the Constitution apply to all state organs.
  - ii. A declaration be and is hereby issued that the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> respondents violated Article 230 of the Constitution and principles of accountability and fairness herein by reducing their mileage and abolishing plenary allowances without public participation.
  - iii. A declaration be and is hereby issued that the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> respondents violated Article 10 of the Constitution on principles of good governance.
  - iv. A declaration be and is hereby issued that the procedure for approval of the Wajir County Program based budget for the financial year 2024/2025 and all the processes flowing from the said notice were unprocedural, illegal, null and void.
  - v. A declaration be and is hereby issued that the letter of the decision of the 2<sup>nd</sup> respondent in the 2<sup>nd</sup> Gazette identifying Makoror as the new County Headquarters as unconstitutional, null and void.
  - vi. That the Court do find that the petitioners are entitled to damages for violation of their constitutional rights.
  - vii. An order be and is hereby issued in the nature of a permanent injunction restraining the 4<sup>th</sup> respondent, either acting on their own and/or through their agents, employees, servants and/or any other person acting and or purporting to act under their instructions and/or orders from implementing and enforcing the Wajir County Program based budget for the financial year 2024/2025.
  - viii. Any other order that the Court deems fit for purposes of administering justice to the case.
  - ix. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents be condemned to pay the petitioners the costs of the petition.
2. Contemporaneously filed with the said petition is the notice motion of even date seeking that;
  - a. This application be certified as urgent and be heard ex parte at the first instance.
  - b. Pending the inter partes hearing of this application, this Honourable Court be pleased to issue a temporary conservatory order staying the implementation of Wajir County program based budget for the financial year 2024/2025 as published by the 1<sup>st</sup> respondent on 1<sup>st</sup> August, 2024.



- c. Pending the hearing and determination of this application and the applicants' petition, this Honourable Court be pleased to issue a temporary conservatory order staying the implementation of Wajir County program based budget for the financial year 2024/2025 as published by the 1<sup>st</sup> respondent on 1<sup>st</sup> August, 2024.
  - d. Pending the hearing and determination of the applicants' petition, a conservatory order do issue stopping any intended and/or future utilization of the non-gazetted Wajir County Headquarter Chamber, Makoror for assembly sittings.
  - e. Pending the hearing and determination of this motion, an order be and is hereby issued directing the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to utilize the County Assembly of Wajir Chamber as the venue for all assembly business.
  - f. An order be and is hereby issued that the applicants' petition be heard and dispensed off within reasonable time.
  - g. Costs be in the cause.
3. The application is anchored on grounds set out on the face of it and further amplified by the content contained in the affidavit in support sworn by AbdiKadir Dubow Mohamed on 06-08 -2024. It was averred that on 26<sup>th</sup> July 2024, the 1<sup>st</sup> respondent herein published in the Kenya Gazette vol.CXXVI-113 Gazette NO.9231 that the Wajir County Assembly proceedings for the approval of Wajir County Appropriation bill 2024 was to be held on 30<sup>th</sup> and 31<sup>st</sup> July 2024 at the Wajir County Assembly chamber located at Baraqa ward commencing 9.00am to 2.30 pm. He further averred that the said chamber is the legally recognized headquarter of Wajir County.
  4. That on 30<sup>th</sup> July 2024, the 1<sup>st</sup> respondent herein published yet another Kenya Gazette notice vol. No.115 Gazette notice No. 9480 changing the aforesaid venue for the special assembly sittings to the county Assembly headquarter chamber otherwise known as Makoror to be held on 31<sup>st</sup> July 2024 and 1<sup>st</sup> August 2024 between 9.00 A.m and 2.30pm. It was deposed that the venue for the special sitting as indicated in the second gazette notice was unauthorized, unknown and unfamiliar in law.
  5. It was further deposed that the change of venue was intended to serve the personal interest of the 1<sup>st</sup> to 3<sup>rd</sup> respondents together with their few hand picked attendants to the exclusion of others thus offending the county government Act. That the second venue is inaccessible and a calculated move to disenfranchise the petitioners' oversight role especially coming after having expressed their opposition to the proposed appropriation bill.
  6. He further deposed that every effort to gain entry into the second venue was thwarted by being denied access using security personnel. That the bill was hurriedly debated upon within 3 hours on the first day and then passed in their absence. It was further stated that the subject bill was passed without public participation from all stake holders in the county. That the fiscal strategy paper was not submitted to the sectoral committee as per the Wajir County standing order.
  7. In conclusion, the court was urged to find that the petitioners had established a prima facie case to warrant issuance of an injunction and a conservatory order pursuant to principles laid out in *Giella Vs Cassman Brown and Gatirau peter Munya vs Dckson Mwenda kithinji & 2 others (2014)e KLR* respectively.
  8. In response, the 3<sup>rd</sup> respondent as the CEC finance Wajir County government filed a replying affidavit sworn on 12th day of August 2024 stating that; the petition herein does not meet the threshold of a constitutional petition as laid out in the *Anarita Karimi Njeru* case; it violates the principle on the



presumption of legislation and the separation of powers; the orders sought if granted will paralyze county operations hence cause financial loss in terms of revenue collection thus affecting development projects and other government activities like payment of salaries; the petition and application are overtaken by events and that this court has no jurisdiction to grant the orders sought.

9. It was further averred that the suit is a claim based on employment and labour relations in so far as it relates to the applicants' employment benefits hence this court has no jurisdiction to hear the matter. That section 7B of the county governments Act and Wajir county assembly standing order No.30 does empower the speaker of the county assembly through a gazette notice to gazette change of venue for county assembly sittings hence nothing unusual nor irregular. That the change of venue was occasioned by the petitioners' acts of violence during the first sitting held on 30-07-24 hence making deliberations impossible thus necessitating change of venue.
10. He further averred that on 28-02-24, the county treasury prepared and submitted to the county assembly for approval fiscal strategy paper 2024 pursuant to section 117 of the public finance management Act. That matters of public participation can only be argued during the hearing of the main petition and not in an interlocutory application. That the petitioners have not established invalidity of the impugned legislation for it to be invalidated nor have they sought for an order to quash the appropriation bill.
11. It was averred that the petitioners will not suffer any prejudice should the court not grant the orders sought.
12. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed their joint response through a replying affidavit sworn on 12-08-2024 by hon. Abdille Yusuf Mohamed speaker Wajir County Assembly adopting principally the position taken by the 3<sup>rd</sup> respondent. He averred that on 23-07-24 he received a request from leader of the majority to recall the county assembly house which was on recess up to 13-08-24 to reconvene on 30 and 31-07-2024 for a special sitting to debate on the appropriation bill in respect of the 2024-2025 finance bill. That, on 30-07-24, he caused the gazette through the government printer the publication of those dates as requested. He further deposed that, on 30-07-24, he received another request to gazette and convene special sitting of the assembly on 31-07-24 and 01-08-2024 which he did pursuant to standing order No.30 of Wajir County government and Section 7 B of the county governments Act. That out of the 45 members of the county Assembly, only the petitioners failed to participate in the proceedings.
13. He averred that adequate public participation was conducted as evidenced by the necessary notices marked as AYM 7. That the change of venue was necessitated by the violence meted out during the 1<sup>st</sup> sitting by the petitioners leading to destruction of the hansard and other assembly equipments thus making it impossible to conduct business in the first venue. He attached video clips marked AYM8 as proof of the said violence. In his view, the application does not meet the threshold for grant of a conservatory order.
14. Despite the court directing that parties were at liberty to file submissions, only the 3<sup>rd</sup> respondent complied. The 4<sup>th</sup> respondent did not enter appearance. The petitioner orally submitted basically relying on the content contained in the affidavit in support of the petition. The 1<sup>st</sup> and 2<sup>nd</sup> respondents orally submitted by adopting their responses (replying affidavit).
15. The 3<sup>rd</sup> respondent through the firm of Garane and Somane Advocates filed his submissions dated 14-08-24 literally adopting the averments contained in his response. Basically, it was contended that the applicants had not met the conditions for grant of conservatory orders as spelt in the case of Gatirau Mwenda (supra). It was contended that a court cannot suspend a legislative making process or a statute.



To buttress that assertion, counsel relied on the case of *Andrian Kamotho Njenga v Selection panel for appointment of commissioners of the independent electoral and boundaries commission* (2021)e KLR.

16. Learned counsel further contended that a statute is presumed valid and constitutionally compliant until the contrary is proven. In that regard, the court was referred to the case of *Institute of social accountability and another vs the national assembly & 4 others* (2015) e KLR. Counsel opined that public interest demands that the orders sought should not issue.

### **Determination**

17. I have considered the application herein, supporting affidavit, response thereof, written and oral submissions by all parties. The crux of the matter herein is the alleged unlawful and irregular convening of Wajir county assembly special sitting at avenue other than the officially designated location and also legislation of the Wajir County finance bill 2024-2025 without public participation.

18. The only issue for determination is whether the applicants have met the threshold for grant of the conservatory orders sought. A conservatory order is in its very nature, a temporary relief issued by a court of law to stop a certain act from happening or continuing to happen pending issuance of a substantive order or declaration. In the case of *Invesco Assurance Co.Ltd vs MW(minor suing thro'next friend and mother)* (HW)(2016)e KLR , the court held as follows;

“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. It is an order of statusquo for the preservation of the subject matter”.

19. The threshold for grant of conservatory orders was established by the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [supra] where the apex court held that; -

“(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. 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.” (Emphasis added).

20. The first discernible principle 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 order, he is likely to suffer prejudice. This position was well articulated in the case of *Centre for rights education and awareness (CREAW) and 7 others vs Attorney General* (2011)eKLR. Similar position was held in the case of *Wilson Kaberia Nkunja vsThe Magistrate and judges vetting board and others* Nairobi highcourt constitutional petition No. 154 of 2016(2016)e KLR.

21. 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. The critical consideration is the question 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 County Assembly of Machakos v Governor, Machakos County & 4 others [2018] eKLR].

22. It is trite that when a court is called upon to determine whether a prima facie case has been established, it should not delve into a detailed analysis of the facts and law but should focus on determining whether the applicant has put forward a case that is arguable and not frivolous. In Board of Management of Uhuru Secondary School –vs- City County Director of Education & 2 others [2015] eKLR the Court stated that:

“26. It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evidence of a likelihood of success. The prima facie case ought to be beyond a speculative basis...”

23. Ringera, J as he then was in the case of Trust Bank Limited v Amin Company Ltd & another [2000] KLR 164 defined the term frivolous as follows; -

“A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fide and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action.”

24. In the instant case, the applicants averred that the special sitting to discuss the appropriation bill for the Wajir finance bill 2024-2025 was held in a venue not designated for that purpose hence unlawful. However, the respondents argued that standing order No.30 of the Wajir county government and section 7B of the county governments Act does allow such special sittings to be held at any location within the county upon gazettelement save for the inaugural sitting.

25. For avoidance of doubt, Section 7B(2) of the County Governments Act does provide that;

“except for a sitting of a new county assembly under subsection (1), a sitting of a county assembly may be held at any place within the county and may commence at any time as the county may appoint”

26. In view of the above provision which is not challenged, it is not illegal to hold county assembly sittings at any location within the county as long as there is notification through a Kenya gazette notice. The 1<sup>st</sup> and 2<sup>nd</sup> respondents averred that out of the 45 county Assembly members, only the petitioners who did not attend. This fact was not controverted implying that the venue was accessible and that the more than 2/3 of the members attended. On that ground, the applicants have not established a prima facie case to warrant grant of a conservatory order on account of that allegation.

27. On the aspect of lack of public participation before passing the bill, it was incumbent upon the respondents to prove to the contrary. In the case of Robert N Gakuru and Others v County Government of Kiambu County [2014] eKLR Odunga-J (as he then was), made the following relevant observations with regard to public participation:

“...‘Facilitations of public involvement in the legislative process therefore means taking steps to ensure the public participate in the legislative process...parliament and the provincial



legislature must be given a significant discretion in determining how best to fulfil their duty to facilitate public participation.”

28. The 1<sup>st</sup> and 2<sup>nd</sup> respondents attached public participation notices indicative of the involvement of the public in the budget making process. This fact was not controverted. I find this to be reasonable explanation subject to proof during the hearing of the petition.
29. On the question of the assembly reducing the applicants’ mileage and allowances, that is not a constitutional issue worth considering at the interlocutory stage or before this court hence no prima facie case established on that account.
30. I have noted that the bill that led to this petition was passed on 31-07-24 and an act of the county assembly created. There is nothing therefore to preserve as the application was filed after the event which was 06-08-24 hence overtaken by events.
31. However, it is incumbent upon the applicants to prove that the enacted Act does not meet the test of presumption of validity in compliance with the constitution. I agree with the respondents that to suspend the already enacted act at the interlocutory stage will not be in the interest of the people of Wajir before the applicants prove how unconstitutional the Act is. See *Judith Karigu Kiragu & another v county government of Nairobi; Attorney General & another (interested parties)* (2021) e KLR where the court said that a statute can only be suspended in the clearest of cases and where the same is a threat to life or a limb.
32. In my view, there is no prejudice to be occasioned on the applicants if the conservatory orders are not granted. Besides, public interest will prevail over personal interest. The substance of the petition is intact hence no loss will be suffered. Further, the petition will not be rendered nugatory in so far as the validity of the Act is concerned.
33. The upshot of the above holding is that the application herein does not meet the threshold for grant of any conservatory order as passed. The application is consequently dismissed. Costs shall be in the course. Parties to fast track and expedite the hearing of the main petition.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16<sup>TH</sup> DAY OF SEPTEMBER 2024**

**J. N. ONYIEGO**

**JUDGE**

