



**Maalim & 5 others v Cabinet Secretary Ministry of Lands & Physical Planning & 3 others
(Constitutional Petition E005 of 2021) [2023] KEHC 1109 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1109 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CONSTITUTIONAL PETITION E005 OF 2021**

M MUYA, J

FEBRUARY 16, 2023

BETWEEN

**ALI HUSSEIN MAALIM 1ST PETITIONER
MOHAMED NOOR ABDULLAHI ABDI 2ND PETITIONER
MOHAMED YUSSUF SHEIKH 3RD PETITIONER
MOHAMED ALI BAJI 4TH PETITIONER
AHMED ALI OMAR 5TH PETITIONER
IBRAHIM ISAMI MOHAMED 6TH PETITIONER**

AND

**THE CABINET SECRETARY MINISTRY OF LANDS & PHYSICAL
PLANNING 1ST RESPONDENT
COMMUNITY LAND REGISTRAR, NORTH EASTERN REGION 2ND
RESPONDENT
THE COUNTY GOVERNMENT OF MANDERA 3RD RESPONDENT
THE ATTORNEY GENERAL 4TH RESPONDENT**

RULING

1. The Petition dated 24th day of May, 2021 seeks the following orders:
 - a. That a declaration do issue that the Respondents have failed to involve consult and inform the Petitioners on the intended election of members of community land management committed for Mandera County in line with the Constitution of Kenya 2010.



- b. That a declaration be issued directed at the Respondents, that any election of members of community land management committee in non –compliance with the law is therefore null and void as initio and unconstitutional.
- c. That an order be issued preventing stopping or discontinuing any act or omission by the Respondents over election of members of community land management committee in exclusive of other ethnic group until the petitioners are fully involved.
- d. That an order do issue directing the Respondent to recall rescind and or set aside programmes and plans for election of members of community land management committee until community’s rights and freedoms are upheld.
- e. That a declaration do issue to the 1st, 2nd, 3rd and 4th Respondents shall not commence any election of inauguration of County until the Respondents involve all ethnic groups in election of members of community land management committee.

Petitioners Case

Background

2. It is submitted that the Petitioners are residents of Mandera County, and that on the 19th day of May, 2021 the Respondents posted invitations to elect members of community land management committee. The invitation however, was extended only to Murale Community despite the fact that there are other communities living in the County and would be affected by the decisions made.
3. This forms the basis of this petition, wherein conservatory orders are sought which are to bar and restrain the 1st, 2nd, 3rd and 4th Respondents from carrying out the election without including all the other ethnic groups.
4. Counsel for the Petitioner Mr. Nzili has framed the issues for determination thus;
 - i. Whether the court should grant the petitioner conservatory orders to stop the Respondents from carrying out the elections.
5. It is submitted that Article 23 (3) of the *Constitution* of Kenya 2010 empowers this court to issue conservatory orders in proceedings relating to threats to and violation of rights.
6. Counsel places reliance in the case of: *Law Society of Kenya v Office of the Attorney General and Another v Judicial Service Commission (Interested party)* [2020] eKLR. Where in the Supreme Court case of: *Gatirau Peter Munya v Dickson Mwenda Kithinji* Petition Number: 5 of 2014(2014) eKLR.

It was held:

“Conservatory orders bear or more decidedly 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 limited to such private party issues as the prospects of irreparable harm.” Accruing during the pendency of a case or high probability of success, “ in the applicants 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 magnitude and priority levels attributable to the relevant causes.”



7. Counsel for the Petitioners also places reliance in the Case of: Nubian Rights forum & 2 others -vs- Attorney General & 6 Others, Child Welfare Society & 8 others (interested parties).
8. Centre for intellectual property & information technology (proposed Amicus Curiae) Petition Number; 56, 58 & 59 of 2019 (2019) eKLR.

“As to the definition of a matter of Public or General interest to mean: That in which a class or community have a pecuniary interest or some interest by which their legal rights or liabilities are affected.”

9. It is submitted that the matter of “Public Interest:” has been sufficiently demonstrated in that the community in which the petitioners live consists of a number of ethnic entities that have been left out of the election process and hence a violation of their legal rights.

Constitutional Values

10. Counsel for the Petitioners relies on the Case of: Centre for Rights Education and Awareness (Creaw) & Another -vs- Speaker of the National Assembly & 2 others (2017) eKLR. Where it was held: -

“It is for the Court to uphold the Constitutional values and enforce the Constitutional limitations.

11. It is submitted that a number of Constitutional Principles are being violated in the way they are carrying out the Election process.

- a. Article 27 of *the Constitution* which provides for equality and freedom from discrimination.
- b. Section 3 of the *Community Land Act* provides that any one dealing with Community land shall be guided by the Principles provided in Article 10 and 60 of *the Constitution*.

The Principles in Article 10 being those of equality, non –discrimination and inclusiveness.

Article 60 provides for Principles of Land Policy, that Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable.

Proportionate Magnitude

12. The issue of exclusion of other communities from the Election process and inviting only one hence discriminating the others.

Respondents Case

13. This application is opposed on the following grounds that:
 - a. The Petitioners have not demonstrated how the Respondents have violated their Constitutional rights.
 - b. That they have not specified the specific rights that have been infringed.
 - c. That the Petitioners have not shown the particulars of the national values and principles of Governance violated under Article 10.
 - d. That the Petitioners have not shown their rights to Equality and freedom from discrimination, protection of right to property, economic and social rights, the right to fair administrative action under Article 27, 40, 43, 47 have been violated.



14. Following the above grounds of opposition, it is submitted that in the case of: Anarita Karimi Njeru -vs- Republic (1979) eKLR. It was held:

“ If a person is seeking redress from High court or an order which invokes reference to a Particular section in *the Constitution*. It is important, if only to ensure justice is done in his case that he should set out to the reasonable degree of Precision that of which he complains, the Provision said to be infringed and the manner in which they were alleged to be infringed.”

Counsel for the Respondent also places valiance in the Court of Appeal case of: Mumo Matemo -vs- Trusted Society of Human Rights Alliance (2014) eKLR.

Where it was held:

“The Principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court...

Procedure is also a handmaiden of just determination of cases, cases cannot be dealt with justly, unless the parties and the court know the issues in controversy, pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party.

The Principle in Anarita Karani Njeru (supra) that established the rule that requires reasonable precision in framing of issues in Constitutional Petitions is an extension of this principle”

15. Its submitted that, the violations of the various rights as alleged, right to information, right to elect members freely and fairly, right to freedom of movement and residence, right to protection right to clean and healthy environment, economic and social rights water, health and education, right to fair administrative action, right to access to Justice and right of marginalized and minority groups which are provided for in Articles 12, 35, 38, 39, 40, 42, 43, 47, 48 and 56 of *the Constitution*, it has not been shown in what way or manner they have been violated or infringed. It is further submitted that the Petitioners have failed to set out with a reasonable degree of Precision the manner in which the rights and freedoms were violated by the Respondents.
16. The Respondents further submit that the Petition is incompetent, misconceived and an abuse of the Court process.
17. Counsel places reliance in the case of; Godfrey Paul Okutoyi (suing on his own behalf and on behalf and representing and for the benefit of all past and present customers of banking institutions in Kenya) -vs- Habil Oluca - Executive Director (secretary) of the Kenya Bankers Association (being sued on behalf of Kenya Bankers Association & Another (2018) eKLR. Which is on the issue of rights conferred by statute not being fundamental rights under the bill of rights:

Counsel for the Respondents introduces the doctrine of Constitutional avoidance. Reliance is placed in the Case of: Matatu Welfare Association & Another -vs- Invesco Assurance Co. Limited & 3 others 2019 eKLR. Where it was held:

“The Principle of Constitutional avoidance in the case of: Communication Commission of Kenya & 5 others -vs- Royal Media Services Limited & 5 others (2014) eKLR. Where it was held:

“The Principle of avoidance entails that a court will not determine a Constitutional issue, when a matter may properly be decided on another basis. In South Africa in S –vs-



Mathungu 1995 (3) SA 867 (cc) the Constitutional Court articulated the Principle of avoidance - by Kentridge AJ in his minority judgment thus:-

“ I would lay it down as General Principle that where it possible to decide any case Civil or Criminal, without reaching a Constitutional issue, that is, the course which should be followed.”

Issue of Jurisdiction

18. Reliance is placed in the case of: Owners of Motor vessel Lilian -vs- Caltex Oil Kenya Limited (1989) where it was held:

“Jurisdiction is everything, without it a court has no power to make one more step... a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction.”

19. While its conceded that the High Court under Article 165 (3) of *the Constitution* has Jurisdiction to determine question as to whether a fundamental right has been infringed, that right it is argued is subject to Article 165 (5) of *the Constitution* which provides:

“The High Court shall not have jurisdiction in respect of matters (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution or (b) falling within the jurisdiction of the courts contemplated under article 16 2 (2) of *the Constitution* to wit; The Environment and Land court created by Parliament under an Act of 2011.

20. Under Section 13 (2) of the said Act that court is granted powers to deal with land matters as specified thereto.
21. The court is urged to find that the petition concerns a land question and the court should exercise Constitutional avoidance and transfer the matter to Environment and land court.

Whether there was public participation.

22. Its counsels submission that public participation is provided for under Article 110 (2) (a) and 232 (1) (d) of *the Constitution*.

Reliance is placed on the case of: National Association for the Financial inclusion of the informal Sector -vs- Minister for Finance & Another (2012) eKLR. Where it was held:

“I agree that Public participation as a National value is rooted in this fact that Kenya is a Democratic state and that Public participation fulfils and complements the other values of good governance, Transparency and accountability. *The Constitution* does not prescribe how Public participation is to be effected in every case where a violation is alleged it is a matter of facts whether there is such a breach or not.”

23. It is further submitted that there was public participation since the form of conducting it, is not case in stone.
24. Issues for determination
- I. Whether the Petitioners have demonstrated that their Constitutional rights were violated as alleged.
 - II. Whether the court has jurisdiction to hear and entertain the matter.



III. Whether the Petitioners are entitled to the Orders sought.

Analysis and Determination

25. Whether the Petitioners have demonstrated that their Constitutional rights were violated. This Petition seeks several declaratory orders by way of Conservatory ones. On the 26th day of May, 2021 Abida Ali Judge did issue a Conservatory order staying/ suspending the Notice to hold Elections for the membership of Mandera County Community Land Management Committee by the Respondent scheduled for 26th May, 2021 or any other day, Constitution of the said Committee, assumption to office, inauguration of the said Committee and any activities relating to registration and management of community land by such a committee pending the hearing and determination of this application or until such time as the Constitutionality of the said exercise shall be determined by the Honourable court.
26. The genesis of this Petition was said to be the placement of an Advert in the Newspapers of 19th May, 2021 posting an invitation to elect members of community land management committee.
27. The grouse, however, was the fact that the invitation only extended to members of Murale Community only.
28. The Petitioners are residents of Mandera County which is said to be predominantly occupied by ethnic Somalis with Garre clan representing the majority, followed by Regodia, Murale and Kona tribes.
29. The 2010 Constitution birthed the [Community Land Act](#) 2016 which brought forth the Community Land Regulations 2017.
30. Under Section 7 of the [Community land Act](#), the 2nd Respondent who is the Community Land Registrar North Eastern Region is by law required to call for election of members of community land management committee to undertake statutory duties under the Act including registration of County Land.
31. It is the Contention by the petitioners that members of the County Land Management committee are to be elected by a Community Assembly by way of a secret ballot as per first and second schedule to the Act.
32. The Public notice issued by 2nd Respondent being Ref: LND/ CSA/ CLA/ 002 was only addressed to Murale Community elect members of County Land Management Committee for Mandera County pursuant to Section 7 (a) of the [Community Land Act](#) which was to be held at LAFEY Town CDF Hall on 26th May, 2021 at 10.00a.m.
33. It is the contention of the Petitioners that there was no consultation, no public participation and inclusivity as envisaged under the law and by inviting only one Community in a County with numerous communities reside, this act was tantamount to discrimination.
34. The Respondents in this Petition are Public Servants.
35. Article 20 (1) of [the Constitution](#) provides:

“The bill of rights applies to all law and binds all state organs and all persons.”

Article 21 (3) of [the Constitution](#) provides:

“All State organs and all Public officers have the duty to address the needs of vulnerable groups within society including women, older members of society, persons with disabilities,



children, youth, members of minority or marginalized community and members of particular ethnic religious or cultural communities”

36. Article 23 of *the Constitution* grants the High Court in accordance with Article 165 of *the Constitution* to hear and determine applications for redress of a denial, violation or infringement of a threat to, a right or fundamental freedom in the bill of rights.

Article 23 (3) a Court can grant

- a. Declaration of rights.
- b. An injunction.
- c. A conservatory order
- d.

Article 10 (1) of *the Constitution* Specifically provides for values and principles of Governance thus:

“The National values and principles of Governance in this article bind all state organs, state officers, public officers and all persons whenever any of them

- a. Applies or interprets *the Constitution*.
- b. Enacts, applies or interprets any law or
- c. Makes or implements public policy decisions.

37. The National values and principles of Governance include:

- a. Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of people.
- b. Human dignity, social justice, inclusiveness, equality, human rights, non –discrimination and protection of the marginalized:
- c. Good governance, integrity, transparency and accountability and
- d. Sustainable development.

38. Section 37 of the *Land Act* 2012 allows for Management of Community Land as per Article 63 of *the Constitution* .

39. A perusal of the Respondents grounds of objection and submissions show that the existence of the 2nd Respondents Public notice Ref No. LND/ CSA/ CLA/002 for Murale Community to elect members of Mandera Land Committee Management Board is not denied. Nor is it denied that apart from Murale Community, there are other communities who are resident in Mandera County.

The fact that there was no consultation, public participation and inclusivity is not seriously denied apart from stating that the invitation was done in accordance with the law as *the Constitution* does not define what is the extent of public participation.

40. The Respondents would want to shield themselves under the doctrine of Constitutional avoidance. This doctrine is only applicable where the court is dealing with violation or infringement of a statute but not the rights and fundamental freedoms in *the Constitution*.



50. On the issue of jurisdiction. The High court is granted power under Article 23 of *the Constitution* to hear and determine applications for redress as in the present petition.
51. The 1st, 2nd and 4th Respondents are public servants. The 3rd Respondent is a County established under Article 6 (1) of the 1st schedule of *the Constitution*. Article 20 of *the Constitution* on bill of rights binds all state organs and all persons.
52. From the evidence before this court, it has been demonstrated to the satisfaction of the Court that the Respondent's did not exercise the principles of public participation, inclusiveness, equality, non-discrimination, transparency, good governance in implementing public policy related to an intended election for constitution of Mandera Community Land management committee. This was a gross infringement of the petitioners rights under *the Constitution*.
53. The Petitioners have properly demonstrated that they deserve the orders sought. The Petition has merit and its allowed in terms of prayer (a), (b) (c) (d) (e), and (g).

RULING DELIVERED IN OPEN COURT THIS 16TH DAY OF FEBRUARY, 2023

M. MUYA

JUDGE

16-2-2023

In the presence of:

Miss Gathoni holding brief for Miss Mutemi for the Ex-parte applicant.

Mr. Martin - Court Assistant.

M. MUYA

JUDGE

16-2-2023

