



REPUBLIC OF KENYA



KENYA LAW
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**Kariuki & others v County Government of Nyandarua & another
(Petition 2 of 2023) [2023] KEHC 2246 (KLR) (20 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2246 (KLR)

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

PETITION 2 OF 2023

CM KARIUKI, J

MARCH 20, 2023

BETWEEN

JOHN MURAYA KARIUKI & OTHERS PETITIONER

AND

COUNTY GOVERNMENT OF NYANDARUA 1ST RESPONDENT

MOSES NDIRANGU BADILISHA KIARIE 2ND RESPONDENT

RULING

1. The application herein mainly seeks temporary conservatory orders to the effect that pending the hearing and determination of this application interpartes, this court be pleased to issue interim conservatory orders suspending the enforcement and/or implementation of Nyandarua County Finance Act, 2023 and in particular code 499 and code 1016 (d) (e), (f) and (g) including but not limited to collecting the newly introduced and excessive cess fees and levies as purportedly increased in the aforesaid bill from truck and trailer owners and drivers, saw millers and general dealers within Nyandarua County.
2. Further, the application seeks temporary conservatory orders to the effect that pending the hearing and determination of the petition filed herein, this court be pleased to issue interim conservatory orders suspending the enforcement and/or implementation of Nyandarua County Finance Act, 2023, and in particular code 499 and code 1016 (d) (e), (f) and (g) including but not limited to collecting the newly introduced and excessive cess fees and levies as purportedly increased in the aforesaid bill from truck and trailer owners and drivers, saw millers and general dealers within Nyandarua County.
3. Moreover, the applicant seeks that, pending the interpartes hearing and determination of this application, this honorable court be pleased to order for the fearing and release of all motor vehicles, pickups, lorries, and trailers either clamped down or impounded in PTO purported implementation



of Nyandarua County Finance Act 2023 and in particular code 49 (a) and 1016 (d), (e), (f) and (g) thereof.

4. The applicant also seeks that, pending the hearing and determination of the petition, this honorable court be pleased to order for the freeing and release of all motor vehicles, pickups, lorries, and trailers either clamped down or impounded in PTO purported implementation of Nyandarua County Finance Act 2023 and in particular code 49 (a) and 1016 (d), (e), (f) and (g) thereof.
5. I have considered the amended application; the bone of contention is the approval and enactment of the Nyandarua County Finance Act 2023, impugned act hereinafter, which the applicants challenge for want of public participation. The applicants averred that there was no existence of stakeholders' participation when the impugned act was enacted; however, the respondents' contended that public participation was duly done as required by the law, and a substantive public participation report developed to that effect.
6. The guiding principles upon which Kenyan Courts make findings on interlocutory applications for conservatory orders within the framework of article 23 of the *Constitution* are now fully settled. In considering conservatory orders, the court is not called upon and is not required to make any definitive finding, either of fact or law, as that is the purview of the court that will, in the long run, hear the petition. Conservatory orders are remedies provided for under the *constitution* and are primarily meant to maintain the status quo pending judgment.
7. In *Judicial Service Commission v Speaker of the National Assembly & another* [2013] eKLR, the court had the following to say about the nature of conservatory orders:

Conservatory orders are not ordinary civil law remedies but are remedies provided for under the *Constitution*, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders, which may only attach to a particular person.

8. The principles applicable for the granting of conservatory orders have been discussed by various courts. In the locus classicus case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] Eklr, the court stated as follows: -

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 the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes...The principles to be considered before a court of law may grant a stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court



of Appeal. Before a court grants an order for a stay of execution, the appellant, or intending appellant, must satisfy the court that:

the appeal or intended appeal is arguable and not frivolous; and that unless the order of stay sought is granted, the appeal or intended appeal were it to eventually succeed, would be rendered nugatory.

These principles continue to hold sway not only at the lower courts but in this court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:

That it is in the public interest that the order of stay be granted. This third condition is dictated by the expanded scope of the bill of rights and the public spiritedness that runs through the Constitution”

9. Additionally, in Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board and others [2016] eKLR, the court, after putting into consideration many cases, summarized three main principles for consideration on whether to grant conservatory orders as follows: -An applicant must demonstrate that he has a *prima facie* case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution. Whether, if a conservatory order is not granted, the petition alleging violation of, or threat of violation of rights will be rendered nugatory; and The public interest must be considered before the grant of a conservatory order.
10. Further, in Board of Management of Uhuru Secondary School v City County Director of Education & 2 others [2015] eKLR, the court summarized the principles for grant of conservatory orders as: - The need for the applicant to demonstrate an arguable *prima facie* case with a likelihood of success and to show that in the absence of the conservatory orders, he is likely to suffer prejudice. 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. thirdly, the court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.
11. The applicants’ case is founded on the claim that there was no public participation prior to the enactment of the impugned act. The applicant asserted that the 1st respondent, either on its own volition or at the request and/or influence of the 2nd respondent, has caused to be approved and enacted the impugned act without the mandatory public participation and therefore denying the people of Nyandarua County and more, so stakeholders involved in the trade and manufacture of forest produce the right to participate in the said exercise that clearly made decisions adversely affecting them, making the approval and assent of the said bill unlawful *ab initio* and of no consequence.
12. Further, the applicants averred the impugned act is a complete departure from all previous bills, including the Nyandarua County Finance Act, 2022, and is indifferent to the economic meltdown brought about by Covid 19 pandemic and just concluded general elections, the prevailing drought, and the general global economic decline.
13. It was also argued that the purported cess and levies, if allowed to be imposed and/or implemented, will be punitive, oppressive, and amount to double taxation as the dealers are also charged separate fees for the movement of logs and also for timber produced from the same logs and generally cause hardship to most Kenyans and defeat the government policy on affordable and low-cost housing as also enunciated in the ruling party’s manifesto.



14. The applicants insisted that it is only by issuance of the conservatory orders sought that the harassment, intimidation, levying of illegal fees and charges, clamping and impounding of the applicants' vehicles/lorries will be stopped. They lamented that the respondents had increased their fees and charges without any legal justification.
15. The petitioners insisted that the actions of the respondents are in contravention of articles 185 (2) and 209 (5) of the Constitution when read with section 132 of the Public Finance Management Act and section 116-121 of the County Government Act on delivery of service as the same does not empower them to conduct themselves in a manner which is detrimental to the larger interest of the people and the county.
16. On the other hand, the respondent argued that the 1st respondent is empowered by the Constitution, The County Government Act 2012, and the Public Finance Management Act 2012 to impose permit fees, license fees, rental fees, and charges for services to finance its operations and provisions for services which do not infringe upon the applicant's rights. That the said levies, having been sanctioned by the impugned act, are lawful and proper.
17. The respondent asserted that public participation was conducted on the impugned act, then the Nyandarua County Government Finance Bill 2022/2023 as required by the law, and a substantive public participation report developed to that effect. That the people of Nyandarua County were duly invited to participate in and submit their memoranda on the act *vide* an advertisement on page 2 of the Daily Nation Newspaper dated September 20, 2022. Further, the public was given adequate time to submit their memoranda in regard to the bill.

Determination

18. It is trite law that a *prima facie* case is not a case that must succeed at the hearing of the main case. However, it is not a case that is frivolous. Expressly, an applicant has to show that he or she has a case that discloses serious and arguable constitutional issues to be tried or a case alleging violation of rights.
19. The applicants have asserted that the respondents approved and enacted the impugned act without the required public participation. Additionally, they asserted that the purported cess and levies, if allowed to be imposed and/or implemented, will be punitive, oppressive, and amount to double taxation.
20. In the case of Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County Government of Nairobi & 3 others [2013] eKLR: The petition was in respect of clause 6.1 of the Nairobi City County Finance Act of 2013, which authorized the County Government to charge a motor-vehicle parking fee of Kes 140 which the petitioners claimed to be oppressive and enacted in violation of the principle of public participation court held;

“It is clear that the 1st and 2nd respondents (County Government of Nairobi & Nairobi City County Board) involved the public in the process leading to the enactment of the Nairobi City County Finance Act of 2013. They engaged those who would be affected by their decisions, and the latter was given details of the proposals and an opportunity of stating their objections if any. The process was highly public as there were public forums, meetings with stakeholders, media reports and even lobbying and an opportunity to make written representations through written memoranda”. He went further to state that, “It does not matter how the public participation was effected. What is needed is that the public was accorded some reasonable level of participation”.



21. The public notice published by the 1st respondent allegedly indicated that the process was to take place and eventually took place in 3 days, namely 14th, 17th and November 18, 2022, in 6 venues. There were no specific stakeholders invited; notably, the court at this stage is not called upon to make a definite finding on facts or the law but instead is required to evaluate the material placed before it and decide whether the applicant has made a *prima facie* case with the likelihood of success.
22. It is my considered view that the applicants have raised valid questions on the legality of the impugned act centering on the lack of public participation as espoused by article 10 of the [Constitution](#) and thus have therefore established a *prima facie* case with a likelihood of success.
23. However, I must also interrogate whether the other conditions necessary for the grant of the conservatory orders sought have been met. Apart from establishing a *prima facie* case, the applicant must further demonstrate that unless the conservatory order is granted there is a real danger that may be prejudicial to him or her, and/or the petition or its substratum will be rendered nugatory.
24. The applicants insisted that it is only by issuance of the conservatory orders sought for that the harassment, intimidation, levying of illegal fees and charges, clamping and impounding of the applicants' vehicles/lorries will be stopped. They lamented that the respondents had increased their fees and charges without any legal justification. However, the respondents insisted that the 1st respondent is empowered by the [Constitution](#), The [County Government Act](#) 2012, and the [Public Finance Management Act](#) 2012 to impose permit fees, license fees, rental fees, and charges for services to finance its operations and provisions for services which do not infringe upon the applicant's rights. But based on what and to what extent? Does the respondent have a blank cheque to impose any quantum of the amount they deem fit? The court has perused with keen interest the elements of changes effected, in particular, as set out in code 499 and code 1016 (d) (e), (f), and (g). I know they will be the subject of petition contestation, but on the face of it wonder whether they were subjected to stakeholders' scrutiny in public participation.
25. In my view, the applicants have demonstrated irreparable damage that they will suffer if the impugned parts of the act and, in particular, as set out in code 499 and code 1016 (d) (e), (f) and (g) are enforced the way they have been set. In any case, it is my finding that if the applicants get the conservatory orders sought and the petition succeeds, they may not be adequately compensated by the county government for the damage, which may entail even the collapse of their businesses. On the contrary, if the petition fails, the respondent can be compensated through charging levies prescribed and any other remedy available before this court, as petitioners will still be running their businesses.
26. Additionally, in granting conservatory orders, the court must also consider the principle of proportionality. I agree with Ojwang, AJ (as he then was) in [Suleiman v Amboseli Resort Limited](#) [2004] 2 KLR 589, where the court stated that in responding to prayers should always opt for the lower rather than, the higher risk of injustice. The learned judge expressed himself as follows:

“...Although the court is unable at this stage to say that the applicant has a *prima facie* case with a probability of success, the court is quite convinced that it will cause the applicant irreparable harm if his prayers for injunctive relief are not granted; and in these circumstances, the balance of convenience lies in favour of the applicant rather than the respondent. There would be a much larger risk of injustice if the court found in favour of the defendant than if it determined this application in favour of the applicant”
27. Accordingly, it is my view that it is in the wider interests of justice to avoid a situation where Nyandarua County Government operations are paralyzed, in turn affecting Nyandarua County residents by lack



of funding from revenue collection if the conservatory orders are issued to suspend the whole act impugned. There are critical county functions that cannot run without funding, and the withholding of the funds will cripple them, which is against the public interest. It is my view that public interest discourages the suspension of the impugned act in its entirety. However, the levies in codes 499 and 1016 (d), (e), (f), and (g) may kill altogether the petitioner's business at the end of the day, and the 1st respondent refund of the collected fund in event petition succeeds may not revive their businesses.

28. I associate myself with the finding of the court in *Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & 5 others* [2016] eKLR, where the court held that conservatory orders bear a public connotation to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Public interest is paramount in cases of this nature. There is a need to balance the same, to ensure that public entities function effectively, even as the litigation rages, so that at the end of it, no one suffers on account of any conservatory orders made for the preservation of the subject matter. It would not be in the public interest to allow the operations of the County Government to grind to a halt during the pendency of these proceedings. The public interest would allow tinkering with any subsisting conservatory orders to the extent of permitting limited access, as may be allowed by the law, to facilitate the continued functioning of the County Government during the pendency of this matter.
29. Article 159(2)(d) of the *Constitution* compels this court to serve substantive justice between the parties and ensure that the conservatory orders that are issued are not to aid any party but to preserve the status quo that is being challenged by the petition.
30. In balancing between the competing interests of the applicants against the public's interest. I have considered the effect that the orders sought will have versus the proper functioning of the County Government of Nyandarua, and it is my view that granting the orders sought as a whole and thereby crippling the county's financial operations is not within the public's interest. The orders sought would have an adverse effect on the 1st respondent's constitutional mandate as envisioned under article 174 as read with article 175 (b) of the *Constitution*. The *constitution* requires that the 1st respondent has reliable sources of revenue to enable her to govern and deliver services to its residents effectively. At this stage, the balance of convenience tilts in favour of granting the conservatory orders sought to the limited extent as alluded to above.
31. In the upshot, the applicants have evidently succeeded to the extent stated having met the required threshold for the grant of limited conservatory orders, as such, the balance of convenience indeed tilts in favour of so granting the application as hereunder;
 - i. Interim conservatory orders be and are hereby issued suspending the enforcement and/or implementation of Code 499 and Code 1016 (d) (e), (f) and (g) of Nyandarua County Finance Act, 2023 pending hearing and determination of the instant petition or until further orders of the court. To avoid a vacuum arising from the suspended provisions, the predecessor provisions of the impugned Act shall apply until the petition is heard and determined or until further orders of the court.
 - ii. Order be and is hereby issued directing the freeing and release of all motor vehicles, pickups, lorries, and trailers either clamped down or impounded in PTO purported implementation of provisions code 499 and 1016 (d), (e), (f) and (g) of Nyandarua County Finance Act 2023 subject to the owners paying the older charges under the provisions of the preceding Act.



iii. Costs in the main cause.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 20TH DAY OF MARCH 2023.

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CHARLES KARIUKI

JUDGE

