



**Ongaga v County Assembly of Nyamira & another (Petition  
E001 of 2023) [2023] KEHC 20228 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20228 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
PETITION E001 OF 2023  
WA OKWANY, J  
JULY 13, 2023**

**BETWEEN**

**EMILY ONGAGA ..... APPLICANT**

**AND**

**THE COUNTY ASSEMBLY OF NYAMIRA ..... 1<sup>ST</sup> RESPONDENT**

**THE SPEAKER OF THE COUNTY ASSEMBLY OF  
NYAMIRA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Petitioner herein, Emily Ongaga, the County Executive Committee (CEC) Member for Finance, ICT and Economic Planning of the County Government of Nyamira filed this petition against the Respondents to challenge her intended impeachment on account of alleged contravention of various articles of the Constitution. She alleged that the allegations made against her are not within her scope of responsibility but fall under the collective responsibility of the County Executive Committee of Nyamira County.
2. Concurrently with the Petition, the Petitioner filed the Application dated March 6, 2023 that is the subject of this ruling. In the said application, the applicant seeks conservatory/injunctive orders against the Respondents to bar them from conducting the impeachment proceedings against the Petitioner pending the hearing and determination of the Petition. The application is supported by her affidavit and is premised on the grounds that: -
  - (1) 'Vide a letter and Notice of Motion evenly dated February 23, 2023, the Respondents have commenced the process of removal by impeachment of the Applicant as the County Executive Committee Member for Finance, ICT and Economic Planning of the County Government of Nyamira.



- (2) The process of impeaching and removal of the Petitioner/Applicant is in violation of the Petitioner's rights and freedoms enshrined in Articles 10, 25 (c), 35, 47, 50 (1) and 2 (b) and 236 of the Constitution of Kenya.
  - (3) The process of impeaching and removal of the Petitioner/Applicant is in contravention of Section 40 of the County Government Act.
  - (4) The process of impeaching and removal of the Petitioner/Applicant is in contravention of the Nyamira County Assembly Standing Order No 64.
  - (5) The first hearing of the Select Committee was conducted on March 6, 2023 and the Committee is due to prepare and present a report for adoption before the County Assembly within three (3) days from now.
  - (6) If the proceedings for the impeachment and removal of the Petitioner continue as they are, the Petitioner will grievously incur losses and damage and sustained infringement of her constitutional rights and freedoms.
  - (7) The consequent damage of the illegal and unconstitutional process of impeachment and removal of the Petitioner cannot be compensated in an award in damages but conservatory orders.
  - (8) The Applicant's Petition filed herewith will be rendered futile and in vain and the fundamental rights and freedoms of the Petitioner/Applicant would further be trampled upon if this matter is not prioritized, and the urgent orders sought granted.
  - (9) There is continued contravention and injury of the Petitioner's fundamental rights and freedoms.
  - (10) There is therefore an urgent need for conservatory orders to be issued to preserve the Petitioner's constitutional rights and freedoms.
  - (11) It is in the interest of justice and fairness that the Application for conservatory orders and the Petition herein be urgently admitted for hearing and determination.
3. The Respondents opposed the Application through a Notice of Preliminary Objection dated March 10, 2023 contending that the Court lacks the jurisdiction to entertain the Petition since it falls under the ambit of employee-employer relationship and ought to be heard before the Employment and Labour Relations Court.
  4. Through a Ruling delivered on April 27, 2023, this Court dismissed the preliminary objection and found that it has the jurisdiction to hear and determine the Application and the subsequent Petition as it is founded on alleged infringement of the Petitioner's fundamental rights and freedoms under the Constitution. The court then directed that the parties to canvass the Application by way of written submissions.

### **The Petitioner/Applicant's Submissions**

5. The Applicant cited the decision in Judicial Service Commission v Speaker of the National Assembly & Another [2013] eKLR wherein it was held that the High Court has powers to grant appropriate reliefs so that an aggrieved party is not rendered helpless and hapless in the face of a wrong visited or about



- to be visited on them. The Applicant submitted that she had valid grounds for seeking the court's interim protection. Reference was also made to the provisions of Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practise and Procedure Rules, 2013 (the Mutunga Rules) which provide for grant of conservatory or interim orders on an application within a petition for the contravention of rights or fundamental freedoms. It was submitted that the Article 23 (3) of the Constitution grants this court the powers to grant appropriate reliefs. Reference was also made to the decision in *Nancy Makokha Baraza v Judicial Service Commission & 9 Others* [2012] eKLR.
6. It was observed that even though there are no firmly established and embedded rules or principles for the grant of conservatory orders in our jurisdiction, numerous decisions demonstrate some common grounds that warrant the granting of conservatory orders namely; That a conservatory order is aimed at preserving the subject matter of a dispute as it is a remedy in rem not in personam; that the applicant has a prima facie case with a likelihood of success; that the court should bear public interest in mind, constitutional values and the proportionate magnitudes and priority levels attributable to a case in its decision; whether an applicant will suffer prejudice as result of the threatened violation of rights and bear in mind that conservatory orders in public law litigation are meant to facilitate ordered functioning within the public sector and to uphold adjudicatory authority in the court of public interest.
  7. Reliance was placed on the decision in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR where the grounds to be considered in granting conservatory orders were listed as public interest, constitutional values and proportionate magnitude and priority levels attributable to the relevant causes. The Applicant noted that the court also held that conservatory orders bore a more decided public-law connotation as they were orders to facilitate ordered functioning within public agencies and meant to uphold the adjudicatory authority of the court in the public interest. She cited the case of *Centre for Rights Education and Awareness (CREAW) & 7 Others v AG* [2011] eKLR where it was held that a party seeking conservatory orders ought to demonstrate that he had a prima facie case with a likelihood of success and that unless the conservatory order was granted, there was a real danger that he would suffer prejudice as a result of the violation or threatened violation of the Constitution.
  8. Reference was also made to the cases of *Augustin Michael Murandi & 2 Others v Nolturesh Loitoktok Water and Sanitation Co Ltd (Successor in title of National Water Conservation and Pipeline Conservation)* [2017] eKLR; *Wilson Kaberia Nkunja v Magistrates and Judges Vetting Board & Another* (2016) eKLR; *Adrian Kamotho Njenga v Selection Panel for the Appointment of Commissioners of the Independent Electoral and Boundaries Commission* [2021] & 2 Others, IEBC [2021] eKLR, *Invesco Assurance Co v MW [Minor suing thro' next friend and mother (HW)]* [2016] eKLR and *Nancy Makokha Baraza v Judicial Service Commission & 9 Others* [2012] eKLR wherein similar principles were restated.
  9. It was the Applicant's case that the subject matter in this case was her position that impeachment proceedings, which if allowed to continue, would change her cause of action and render the Petition nugatory. The Applicant noted that there would be apparent adverse, irreversible and irreparable effects on her should the orders sought not be granted. It was also submitted that the Applicant had made out a prima facie case because the pleadings revealed apparent constitutional and statutory shortfalls in the impeachment process which called for this Court's interrogation and determination. She cited the case of *Adrian Kamotho* (supra) and *Augustin Murandi* (supra).
  10. On the inherent merit of the case against public interest, the Applicant submitted that impeachment proceedings have to be done legally in order to protect future occupants of the Petitioner's position so as to enable them to discharge the functions of their office without any fear of intimidation through harassment and impeachments. It was further argued that the impeachment would result in disruption



of public service of the County Government and not properly conducted, would lead to further loss of public resources should the Petitioner seek compensation arising from an irregular and illegal impeachment process. The Applicant urged the Court to safeguard the rule of law and uphold the values under Article 10 of the Constitution.

11. It was further submitted that it would be absurd for the Court to litigate on issues concerning the impeachment process while the impeachment was ongoing as such a scenario would potentially result in confusion and embarrassment should the eventual decisions contradict each other. The Applicant argued that if the impeachment process was allowed to continue, the subsequent determination of the petition would be rendered nugatory as the Court would be determining a matter whose position had already shifted thus making it difficult to reverse the impeachment and reinstate the Petitioner, should the court eventually find in her favour.

### **The Respondents' Submissions**

12. The Respondents submitted that the threshold for grant of conservatory orders was established in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR and *Wilson Kaberia Nkunja v Magistrates and Judge's Vetting Board & Another* [2016] eKLR. It was submitted that the principles in *Giella v Cassman Brown* are applicable in this Application alongside the decision in the case of *Judicial Service Commission v Speaker of the National Assembly & Another* [2013] eKLR.
13. The Respondents submitted that the 1<sup>st</sup> Respondent duly exercised its mandate in commencing the impeachment process by informing the Applicant of the same and requiring her to appear before them. They added that the Applicant and her legal Counsel appeared during the proceedings and presented her case without any objection to the sitting of the select committee. They noted that the 1<sup>st</sup> Respondent complied with the dictates of fair administrative action and argued that the Applicant had not produced any evidence to justify the discontinuation of the said proceedings.
14. The Respondents' case was that the 1<sup>st</sup> Respondent is an independent arm of the County government and that the Court was obligated to observe the doctrine of separation of powers and let the due process continue to completion.
15. It was submitted that the Applicant did not establish a prima facie case with a high chance of success to show that the impending decision from the committee was likely to infringe on her constitutional rights and that seeking to stop the proceedings when they had already reached the determination stage was an affront of the Constitution since she had fully participated in the process and was now banking on speculation that her rights would be infringed. The Respondents cited the decision in the *Board of Management of Uburu Secondary School v County Director of Education & 2 Others* [2015] eKLR where it was held that a prima facie case must be beyond speculative basis.
16. The Respondents argued that the orders sought in the application would have the effect of quashing the decision of impeachment which was yet to be made and that the subsequent petition envisioned a situation where the Respondents were not to be allowed to discharge their mandate in law. It was the Respondents' submission that allowing this application would mean that this Court impliedly declared impeachment proceedings illegal yet impeachment is the preserve of the County Assembly. It was submitted that the Court could only intervene in the impeachment after a decision by the County Assembly was made and that at present, such a decision was premature. Thus, they argued that the intended petition will not be rendered nugatory if the orders sought were declined.
17. It was further submitted that the Applicant had not demonstrated the manner in which she would suffer irreparable harm because there was nothing personal about the position she held and that her reputation and character were not in question in the said proceedings. The Respondents' Counsel



submitted that any suspension of the proceedings would amount to interference with due process sanctioned by the law. He cited the case of *Nelson Andayi Havi v Law Society of Kenya & 3 Others [2018] eKLR* where the Court of Appeal held that elections were not immutable and could easily be nullified if conducted in an illegal and unconstitutional manner. Thus, it was Counsel's submission, that even the present impeachment process could still be nullified by the Court if the Petitioner were to succeed and seeking conservatory orders at this juncture was premature and untenable.

18. On public interest, it was submitted that the Applicant did not demonstrate how the orders sought were in the interest of the public. The Respondents' case was that the impeachment process was founded on allegations that there was no accountability for the taxpayers' money and the 1<sup>st</sup> Respondent, as the representative of the people, had the public interest in mind in seeking to address the issues of corruption, incompetence and unethical practice that arose from the Applicant's office.
19. It was also submitted that the 1<sup>st</sup> Respondent was unable to work with the Applicant given the current conflict which had jeopardized the entire functioning of the County Government. It was argued that a suspension of the subject proceedings would condemn the County government to further delays thereby affecting the delivery of services to the people of Nyamira and further, that the proceedings of the 1<sup>st</sup> Respondent were protected by the *Constitution* and the County Government Act 2012. Reference was made to the decision in *Coalition for Reform and Democracy (CORD) & Another vs Republic of Kenya and Another (2015) eKLR* where it was held that suspension of the operation of statutes, statutory provision and regulations through conservatory orders should be wholly avoided except where the national interest demands, and the situation is certain.
20. I have considered the pleadings filed herein and the parties' rival submissions. The main issue for this court's determination is whether the Application is merited.
21. The nature of conservatory orders was explained by the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Civil Application No 5 of 2014 [2014] eKLR, at paragraph 86, where it was held thus: -

' (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.'

22. In *Law Society of Kenya v Office of the Attorney General & Another; Judicial Service Commission (Interested Party) [2020] eKLR* the court listed the grounds for granting conservatory orders as follows:

' From various authorities of the Courts the principles required to be satisfied before granting conservatory orders or interim conservatory orders comprises of the following: -

- a. First, an Applicant must demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.
- b. 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.



- c. Thirdly, the court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
- d. The final principle for consideration is whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.'

23. What constitutes a prima facie case was stated in the case of *Mrao v First American Bank of Kenya Limited & 2 Others [2003] KLR 125* as follows: -

' In a civil application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.'

24. Similarly, in *David Ndi & others v Attorney General & others [2021] eKLR*, the court stated as follows about a prima facie case: -

' 45. The first issue for determination in matters of this nature, is whether a prima facie case has been established and a prima facie case, it has been held, is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, it has to be shown that a case which discloses arguable issues has been raised and in this case, arguable constitutional issues.'

25. I have considered the Applicant's contention that the process of her impeachment was fatally defective and that the grounds for her impeachment are unfounded. This Court is cognizant that it is precluded from determining the merits and demerits of the main Petition at this interim stage. This was the principle established by Ibrahim J (as he then was) in the case of *Muslim for Human Rights (Milimani) & 2 Others v Attorney General & 2 Others [2011] eKLR* as follows: -

'The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a vis the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.'

26. Further, it is noteworthy that establishing that a prima facie case exists is so paramount for an Applicant seeking conservatory orders such that if they fail in this regard, their prayer for interlocutory relief would also fail in its entirety without further consideration of the other grounds. The Court of Appeal explained this in *Nairobi Civil Appeal No 44 of 2014 Naftali Rutbi Kinyua v Patrick Thuita Gachure & Another [2015] eKLR* and referred to Lord Diplock in *American Cyanamid v Ethicon Limited [1975] AC 396*, where the learned Judge stated thus: -

' If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities, that is the end of any claim to interlocutory relief.'



27. It is my finding that from a cursory glance at the Petition, there are arguable grounds that call for this Court's consideration and determination. I find that the Applicant has established that she has a prima case. The issue of whether the Petition is likely to succeed or fail remains the preserve of the Court that will hear and determine the Petition.
28. On whether failure to grant the orders sought would render the Petition nugatory, I find that as correctly argued by Counsel for the Applicant, it would be absurd for this Court to litigate on issues concerning the impeachment process while the same process is at the same time proceeding. The obvious outcome of such a scenario is that the hearing of the Petition will be an exercise in futility because the nature of the subject matter will have been redefined by the ongoing impeachment process. On the other hand, should the Court arrive at a finding that the process was flawed, it would result in a state of confusion where the County Government may already be having another person occupying in the Applicant's position. My take is that in order to avoid such a convoluted outcome, the proper direction is for this Court to preserve the substratum of the main Petition so that the subsequent proceedings are not rendered otiose.
29. On the issue of the prejudice that the Applicant is likely to suffer should the orders sought not be granted. Odunga J (as he then was) in *Simeon Kioko Kitheka & 18 Others v County Government of Machakos & 2 others [2018] eKLR* at para. 64 held thus: -
- ' However, whereas under Article 258(1) of the Constitution, every person has the right to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention, the mere fact that a person is entitled to bring such proceedings does not automatically entitle such a person to grant of conservatory orders. The person is enjoined to go further and show how the refusal to grant the said orders is likely to be prejudicial to him or her.'
30. Counsel for the Petitioner argued that the petitioner will be prejudiced if the orders sought were not granted and that the Court will be litigating on an issue that will have already shifted if the orders sought are not granted. On their part, the Respondents stated that the working relationship between the Applicant and the Respondents was already tumultuous and that stopping the impeachment proceedings would subject the County Government of Nyamira to further delays which will, in turn, impede the delivery of services to their people. They also argued that the Applicant had not demonstrated how she will be prejudiced if the orders sought are not granted.
31. I have considered the rival arguments and it is my view that an obvious prejudice would ensue to the Applicant if the orders she seeks are not granted. This is because the Petition is based on the constitutionality and legality of the impeachment process. If this Court fails to grant the conservatory orders, it is likely that the Respondents will proceed with the impeachment process and should the decision be adverse to the Applicant, her subsequent petition which is already alive before this Court will be rendered nugatory because the issues raised therein will have already mutated. She will be prejudiced because she will be arguing on moot issues. This ground therefore succeeds.
32. Lastly, on the issue of public interest, it was the Applicant's case that should the Court fail to grant the interim orders and later find that the impeachment process was illegal after she has been impeached, public funds would be utilized to compensate her in damages when such an outcome could be avoided by preserving the status quo until the Petition is heard and determined. The Respondents on the other hand argued that they had the legal mandate to represent and protect the interests of Nyamira County residents and that proceeding with the impeachment process would ensure that they were adequately discharging their constitutional and legal functions in protecting utilization of public funds.



33. This Court appreciates the arguments of the parties with respect to public interest but holds the view that since the Petition is already before this court and interim orders have already in place, it will not prejudice any of the parties if the said orders remained in place as the court considers the merits of the main Petition. It is my humble view that the substantive issues of public interest will be best ventilated in the main suit as opposed to this interim stage. As I have already noted in this ruling, failure to grant the conservatory orders will render the subsequent hearing of the Petition an academic exercise. Indeed, it is the duty of this Court to ensure that the parties are accorded a fair opportunity to present their issues without unnecessary disadvantage.
34. In the end, I find that the Applicant has established a case for the granting of the conservatory orders pending the hearing and determination of the Petition. In conclusion, I allow the instant application in the following terms: -
- a. Conservatory order and temporary injunction are hereby granted, staying and/or suspending and/or halting the further and continued impeachment exercise of the Applicant by the Respondents herein until the determination of the main suit in Constitutional Petition E001 of 2023.
  - b. Costs of the application shall abide the outcome of the Petition.

35. It is so ordered.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS  
13TH DAY OF JULY 2023.**

**W. A. OKWANY**

**JUDGE**

