



Abdillah & 3 others v County Government of Wajir (Constitutional Petition E007 of 2023 & Petition E008 of 2023 (Consolidated)) [2023] KEHC 23603 (KLR) (9 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23603 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CONSTITUTIONAL PETITION E007 OF 2023
& PETITION E008 OF 2023 (CONSOLIDATED)**

JN ONYIEGO, J

OCTOBER 9, 2023

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
UNDER ART2(1), ART 3, ART 10, ART 22(1), ART 27(1), ART 39(1), ART 43,
ART 47(1) AND (2) AND ART 196(1) (B) OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF COUNTY GOVERNMENT ACT NO. 17 OF 2012

AND

**IN THE MATTER OF A CONSTITUTIONAL PETITION AGAINST ARBITRARY
INCREASE OF CESS RATES BY THE COUNTY GOVERNMENT OF WAJIR**

BETWEEN

ALI ABDILLAH 1ST PETITIONER

KUSO DAHIR 2ND PETITIONER

ABDULLAHI SHARUBU 3RD PETITIONER

AND

COUNTY GOVERNMENT OF WAJIR RESPONDENT

AS CONSOLIDATED WITH

PETITION E008 OF 2023

BETWEEN

ADAN YUNIS FARAH PETITIONER

AND

COUNTY GOVERNMENT OF WAJIR RESPONDENT



RULING

1. Before this court for determination are two almost identical notices of motion dated 22.06.2023 in respect to petition No. E007 of 2023 and E008 of 2023 wherein the applicants as represented by the firm of Wasuna and Wasuna Advocates sought similar conservatory orders against the respondent. In respect to Petition No.E007 of 2023, the 1st to 3rd applicants sought orders as follows;
 - i. Spent.
 - ii. Pending the hearing and determination of this application inter partes, this Honourable Court do issue a temporary injunction restraining the respondent, its officers, agents, servants and/or representatives, either acting on instructions or otherwise from levying, collecting and/or imposing Kes. 20,000 as cess rate for miraa trucks passing through Wajir.
 - iii. Costs of this application be provided for.
2. The application is premised on the grounds set out on its face and further supported by the supporting affidavit of Ali Abdillah who deposed that on 06.06.2022, the County Government of Wajir embarked on a plan to increase the cess rates and levy on miraa truck transporters to Kes. 20,000 per truck ferrying miraa through the county. That the respondent increased the cess rates arbitrarily, unlawfully and unfairly without stakeholder engagement and public participation.
3. The petitioners/applicants averred that the respondent is likely to execute the said increase yet the same is not guided by any county framework thus making the whole process susceptible to reckless revision. Additionally, the petitioners urged that having been in the business of transporting miraa for a period of over fifteen years, they have been complying with the law but from the recent happenings, it is clear that the respondent is determined to collect cess irrespective of the absence of a legal framework that ought to guide the whole process.
4. This court was therefore beseeched to exercise its unfettered powers and jurisdiction to restrain the respondent vide a temporary injunction from executing the alleged unlawful and arbitrarily imposed cess without first engaging in public participation.
5. The respondent represented by the firm of Gedi & Associates Advocates filed a replying affidavit sworn on 21.07.2023 by Naema Ibrahim, an attorney of the respondent in which she averred that under article 209(2) and (4) of *the constitution*, county governments have an obligation to impose property rates, entertainment taxes and any other tax that is authorized to be imposed by an Act of Parliament and to impose charges for services provided.
6. It was further averred that the Wajir County Finance Act 2023 was passed in accordance with *the constitution*, the *County Governments Act* 2012 and the *Public Finance Management Act*. She denied the accusation that due process was not followed in enacting the said Act. It was her case that article 75 (b) of *the constitution* empowers the respondent to have reliable sources of revenue to enable it govern and deliver services effectively.
7. In response to the allegation that the respondent did not subject the proposal to increase the impugned cess to public participation, it was the respondent's case that on 23.09.2022, an appropriate advertisement was placed by the County Executive Committee Member for Finance and Economic Planning in the Daily Nation Newspaper which said newspaper is of nationwide circulation inviting the public to air their views on the County Finance Bill of 2023. That the same was further placed



in the County website <https://wajir.go.ke> under public participation on County Budget estimates FY 2022/2023 – 2024/2025 Finance Bill 2022. It was argued that the said notice contained the date, venue and time of the forums and further asked members of the public to submit their views either through the email addresses provided or through the office of the CEC member for finance and economic planning.

8. It was her further averment that the respondent undertook a public participation exercise to collect views from the general public and relevant stakeholders through public consultation fora that were held in the following sub counties: Eldas Sub County at the Administrator’s Office at 03.09.2022, Wajir South Sub County at Habaswein Community Library on 03.10.2022, Wajir East at the ICT Hall on 03.10.2022, Tarbaj Sub County on 03.10.2022 and at Bute Sub county Hall on 03.10.2022.
9. It was stated that at the said venues, all members of the public attending to the said public participation forum were given opportunities to peruse the proposed Finance Bill and were taken through item by item. Thereafter, the Bill was introduced in the County Assembly where the County Finance, budget and Appropriations Committee once again facilitated a public participation exercise on all the sub counties. That in as much as the respondent has a responsibility to inform the public, be open, accountable and invite the stakeholders for public participation, they do not have the duty to compel the attendance of the persons invited.
10. That the public participation conducted met the required standards and therefore, the petitioners/ applicants cannot be heard to say that the respondent acted arbitrarily. It was his case that this Honourable Court cannot direct the respondent on how to exercise its mandate of levying the cess and how to administer the same.

Petition No. E008 of 2023

11. Vide notice of motion dated 22.06.2023, the applicant also represented by the firm of Wasuna and Wasuna Advocates sought for orders that:
 - i. Spent.
 - ii. Pending the inter partes hearing and determination of this application, this Honourable Court do issue a temporary injunction restraining the respondent, its officers, agents, servants and/ or representatives, either acting on instructions or otherwise from levying, collecting and/ or imposing Kes. 35,000 as cess rate for miraa trucks passing through Wajir County.
 - iii. Costs of this application be provided for.
12. The application which is a replica in form and spirit to the notice of motion in petition No. E007 of 2007 is premised on the grounds stated on its face and further supported by the supporting affidavit of Adan Yunis Farah who deposed that on 06.06.2022, the County Government of Wajir embarked on a plan to increase the cess rates and levy on miraa truck transporters to Kes. 35,000 per truck ferrying miraa through the county. That the respondent increased the cess rates arbitrarily, unlawfully and unfairly without stakeholder engagement and public participation.
13. The petitioner/ applicant argued that the respondent has arbitrarily, unlawfully and unconstitutionally increased the cess rates for the transportation of miraa through the county without following the due process as required by the law. That despite the respondent not issuing a formal notice, the County Assembly resolutions and public participation, the respondent has proceeded and collected cess at the exorbitant rate illegally, unlawfully and unjustifiably. He urged that the respondent’s arbitrary increase of the cess rates has infringed upon his constitutional rights specifically articles 43, 47 and 196(1)(b)



which predicates upon the county governments to conduct public participation before a formal notice is issued.

14. He contended that he has been complying with the law by paying the cess rate of Kes. 15,000/- dutifully and faithfully. It was his case that the respondent seems hell bent to increase the cess irrespective of the absence of a legal framework that will guide the process. Further, the petitioner/applicant urged that the business of transportation of miraa is his sole livelihood and if this court does not intervene, then he shall be driven out of business. He therefore implored this court to issue a temporary injunction against the respondent from levying Kes. 35,000/- or more on cess of miraa pending the hearing and determination of the petition herein.
15. In response, the respondent adopted the content of the replying affidavit in Petition No. E007 of 2023.
16. The court directed that the consolidated applications be canvassed by way of written submissions and that parties file and exchange the same.

Submissions

17. The petitioners/applicants submitted in regards to three issues to wit: whether Wajir County Government conducted public participation in the first place for Wajir County Finance Act (2023); whether it is legal for the Wajir County Government to levy cess on transporters plying a road categorized under national government and; whether a publication in a gazette notice was made following the enactment of the Wajir County Finance Act (2023).
18. On the first issue, the petitioners/applicants submitted that in as much as the respondent claimed that it carried out public participation before enacting the Wajir County Finance Act (2023), the annexures by the respondent show to the contrary. It was urged that the annexures in reference showed that the public participation meetings for Wajir County Finance Act (2022) were in reference to the financial year 2022-2023 and not 2023 – 2024.
19. That the advertisement by the respondent on the newspapers and website is common to the urbanites as the same could not be practically possible to the people of Wajir to be sufficiently determined that indeed public participation took place. To buttress this position, reliance was placed on the case of Kaps Parking Limited & Another v county Government of Nairobi & Another [2021] eKLR wherein the court stated that public participation must be adequate and sufficient.
20. It was further submitted that the charges as presently levied are exorbitant, oppressive, and harsh as they were based on a previous Finance Act. That it was contrary to the provisions of the Wajir County Finance Act (2022) as the new and/or present Wajir County Finance Act came into force on 01.07. 2023.
21. On the second issue, it was submitted that the respondent is only mandated to levy cess on pick-ups and trucks using county roads and not on roads under the mandate of the national government. The petitioners/applicants contended that counties are only in charge of roads that fall under class D, E, F and G and that they manage these roads in collaboration with Kenya Rural Roads Authority (KERRA). It is against this backdrop that the petitioners/applicants urged that the cess collected by the respondent is thus not only illegal but also unconstitutional. To buttress that position, reliance was placed on the case of Base Titanium Limited v The County Government of Mombasa and Another, Petition No. 22 of 2018 where the court in reference to article 186(1) of *the constitution* held that the functions of the National Government and the County Governments are clearly set out and that the constitutional responsibility for the performance of the functions or exercise of the power remain with the government to which it is assigned by the Fourth Schedule of *the constitution*.



22. On the third issue, it was contended that every power donated to state officers must be exercised in a manner that promotes the values and principles espoused in article 10 of *the constitution*. It was further contended that the actions of the respondent to fail to publicize the enactment of Wajir County Finance Act (2023) in the gazette notice calls for action to prevent any arbitrary charges levied by the county officers. In conclusion, the court was urged to find that for the reason that public participation was not conducted by the respondent prior to enactment of the Wajir County Finance Act (2023), the same can only be said to be unconstitutional in reference to article 196(1) of *the constitution*.
23. The respondent on the other hand submitted in reference to two issues which it sieved for determination as follows; whether the Wajir County Finance Act 2023 was taken through adequate public participation and; whether the applicants met the threshold for the grant of the conservatory orders sought.
24. On the first issue, the respondent contended that the act was subjected to public participation in line with the demands of *the constitution*, the *Public Finance Management Act* and the *County Governments Act*, 2012. To that end, the respondent relied on the case of Commission for the Implementation of *the Constitution* vs Parliament of Kenya & Another [2013] eKLR where it was stated that what amounts to a reasonable opportunity will depend on the circumstances of each case. It was contended that an advertisement was placed on the Daily Nation Newspaper which is a paper of nationwide circulation which notice informed the Public of the County Finance Bill and sought their views. That foras were also held in all the sub counties and interested members of the public who attended aired their views in regards to the said bill.
25. On the second issue, the respondent submitted that granting of conservatory orders has been subject of various judicial pronouncements. To urge that the petitioners/applicants did not demonstrate that they have a prima facie case, reliance was placed on the case of County Assembly of Machakos v Governor, Machakos County & 4 others [2018] eKLR. The respondent implored this court to consider the prejudice that it was likely to suffer because of the high revenue that it stood to lose considering its anticipated revenue generation and budget implementation. It was its contention that the petitioners/applicants do not stand to suffer any prejudice as they will be compensated should the petition succeed. In the end, it was prayed that the application herein be dismissed with costs.

Analysis and determination

26. I have considered the consolidated applications herein, responses thereto, and the written submissions by both parties. The only issue which germinates for determination is; whether the applicants have met the threshold for grant of a conservatory order. The power to grant or not to grant a conservatory order is purely a matter of discretion bestowed upon the presiding court. It is therefore pegged on the standard of proof of a prima facie case.
27. The threshold for grant of conservatory orders was established by the Supreme Court in the case of Gtirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR 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).

28. 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 orders, he is likely to suffer prejudice. 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 third principle is 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].
29. The burden of proof is incumbent upon the applicants to establish the aforesaid criteria. As to the establishment of a prima facie case with a likelihood of success and the probability on the part of the applicants to suffer prejudice unless the orders are granted, the applicants’ case is that in as much as the respondent claimed that it carried out public participation before enacting the Wajir County Finance Act (2023), the annexures by the respondent showed to the contrary. This is actually an arguable issue to ascertain whether indeed it is the finance bill 2023 -2024 or 2022-2023 that was the subject of public participation.
30. On a different trajectory, the petitioner/applicants contended that the respondent is only mandated to levy cess on pick-ups and trucks using county roads and not on roads under the mandate of the national government. The petitioners/applicants further contended that counties are only in charge of roads that fall under class D, E, F and G and that they manage these roads in collaboration with Kenya Rural Roads Authority (KERRA) hence any levy in respect to use on national roads is illegal. This is indeed, prima facie, an arguable point which raises quite a weight issue regarding the role and mandate of county governments on national roads.
31. 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...”
32. 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.”



33. In the case of Khelef Khalifa & 2 others versus Independent Electoral and Boundaries Commission and another [2017] eKLR, the court came up with various parameters to determine whether the principle of public participation has been attained. The court expressed itself that; the agency involved should always ensure that public participation must of essence consider the participation of the governed in quantitative as well as qualitative way and; that the engagement must be meaningful and done in good faith rather than a mere formality. Additionally, on the issue that the respondent is only mandated to levy cess on pick-ups and trucks using county roads and not on roads under the mandate of the national government, I find that the petitioners/applicants have established a prima facie case and therefore, the petition cannot be said to be groundless or without substance.
34. Similarly, 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:
- “... in respect to standards required to facilitate public participation in a legislative process; ‘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.’”
35. Having regard to the petitioners’/applicants’ case, it is not lost to this court that the respondent urged this court to consider the prejudice that it was likely to suffer because of the high revenue that it stood to lose considering its anticipated revenue generation and budget implementation. That in the event that the petition be held in favour of the petitioners, they will be adequately compensated hence no prejudice will be suffered by them. Further, that this Honourable Court cannot direct the respondent on how to exercise its mandate of levying the cess and how to administer the same.
36. It is trite that court’s hands are not restrained from interfering with a process that does not match the laid down procedures as per the law. As such, it is my humble view that if the conservatory orders are not granted, then the petitioners/applicants stand to suffer prejudice as it will be cumbersome to recover what would have been collected. Secondly, some businessmen or women may perhaps drop out of business before the petition is heard and determined in case it goes in their favour. [Also see *Law Society of Kenya v Officer of the Attorney General & another; Judicial Service Commission (Interested Party)* [2020] eKLR].
37. 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, the petition is clear as it basically revolves around inter alia; articles 2(1), 3,10,22(1),23(1), 27(1), art 39(1), art 43,47(1) and (2),196(1) (b) of *the Constitution* which is the supreme law of the Republic and binds all persons and all State organs at both levels of government. It is in reference to the aforementioned reasons that I hold the view that denial of the conservatory orders as prayed by the petitioners/applicants will not enhance the said constitutional values aforesaid.
38. The next question is whether the petition or its substratum will be rendered nugatory if the interim conservatory orders are not granted. Amongst the reliefs sought is a declaration that the fundamental rights and freedoms of the applicants/petitioners stand infringed by the respondent if this Honourable Court fails to step in. 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 petitioners/applicants have established a prima facie case to warrant interim orders so as to secure the substratum of the petition and not to render the petition nugatory.



39. As to consideration of the public interest and relevant material facts in exercising the discretion on whether or not to grant interim conservatory orders, the Supreme Court in the election petition case of Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others SCK (supra) held that the court in deciding whether to grant interim conservatory orders ought to consider 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 cause.
40. In a nut shell, it is my considered view that the applicants/petitioners herein have satisfied the aforesaid principles in regard to the granting of interim or conservatory orders and as such, the orders that are commendable to me are:
- i. Prayer two of the notice of motion dated 22.06.2023 in both petition(s) is hereby allowed pending hearing and determination of the petition(s) herein.
 - ii. The petition(s) herein be heard on priority basis.
 - iii. For avoidance of doubt, the new cess rates are hereby suspended pending the hearing and determination of the petition(s) herein
 - iv. That in the meantime, the respondent shall revert to the old cess rates pending hearing and determination of the petition (s) herein
 - v. Costs shall abide the outcome of the petition.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF OCTOBER 2023

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J. N. ONYIEGO

JUDGE

