REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CONSTITUTIONAL PETITION NO. 43 OF 2019

LONDON DISTILLERS (K) LIMITED.....PETITIONER

-AND-

CABINET SECRETARY MINISTRY OF EDUCATION.....1ST RESPONDENT

COUNTY DIRECTOR OF EDUCATION, MACHAKOS....2ND RESPONDENT

KITENGELA INTERNATIONAL SCHOOLS.....3RD RESPONDENT

ERDEMANN PROPERTY LIMITED.....4TH RESPONDENT

ATTORNEY GENERAL.....5TH RESPONDENT

RULING

1. The present Petition, according to the Petitioner, is an off-shoot from an Appeal instituted by the Petitioner before the National Environment Tribunal being NET Case No. 21 of 2019: **London Distillers (K) Limited -Versus- Erdermann Property Limited & Others** (hereinafter referred to as "the appeal"). In that appeal, the Petitioner contends that v the 4th Respondent carried out constructions in **Greatwall Housing Development Phases 1, 2 and 3** without obtaining the Environment Impact Assessment Licences as required by the law and without carrying out Environmental Impact Study Assessment Reports and did not involve/take into consideration the views of the project affected persons including the Petitioner. Pursuant to the said Appeal, the National Environment Tribunal issued an Order directing the 4th Respondent to stop the ongoing construction of **Greatwall Housing Development Phase 3** pending its determination of the Appeal.

2. It is contended that the Petitioner has just recently noticed that the 4th Respondent had leased/sold out some of the apartments at the said **Greatwall Housing Development Phase 1** to the 3rd Respondent, **Kitengela International Schools**, for the purposes of setting up a mixed day and pre-school. According to the Petitioner, the said apartments where the school is being set up is separated by a road and barely 8 metres apart from the wall immediately where the Petitioner's molasses plant within the distillery is situated. On noticing the branding of the 3rd Respondent's school, the Petitioner through its Advocates on record herein wrote a protest letter dated 18th November 2019 to the 2nd Respondent regarding the intended operation of the school just about 8 metres away from the Petitioner's alcohol distillery within the premises owned by the 4th Respondent. However, to date, the 2nd Respondent though equally served with the suit papers herein have not controverted by way of a response to the said letter and or a filed a Replying Affidavit to contest all of the factual positions put forth by the Petitioner detailing breach of the law in establishing the aforesaid school by the 4th Respondent.

3. To the contrary, the 3rd Respondent has confirmed through the Replying Affidavit filed in Court that it has already employed staff and admitted students to report to school for the new term which commences on 6th January 2020 in breach of the provisions of section 78 of the ***Basic Education Act*** since it has not been issued by the 1st and 2nd Respondents with the requisite License to operate an institution of learning which act is punishable by a fine of up to Kshs. 20,000,000 and or equally imprisonment for a term of up to 3 years.

4. According to the petitioner, in furtherance thereof and to perpetuate the illegalities aforesaid, the 3rd Respondent has branded the exterior walls of the said apartments and exhibited the name of the school thereat as part of the promotion of the school which is equally prohibited by the provisions of section 78 of the ***Basic Education Act*** and which act is punishable by a fine and or equally imprisonment for a term of up to 3 years.

5. The Petitioner lamented that the proximity of the 3rd Respondent's school and the Petitioner's distillery where it has been manufacturing alcohol and selling the same for more than 30 years is barely 8 metres apart is prohibited under the ***Alcoholic Drinks and Control Act***. According to it, regard being had to the previous conduct of the 4th Respondent in making complaints to the authorities and more particularly about the alleged "toxic fumes" and smell emanating from its distillery which only uses molasses, since it commenced the illegal

constructions and the barrage of malicious and contemptuous destruction of the Petitioner's sewer line by employing goons and through the use of its own machinery even after the issuance of Court Orders leading to contempt proceedings being preferred against it, unless curtailed by this Court, and regard being had the recent actions by the 4th Respondent, the Petitioner has real and actual fear of an imminent and fresh round of a callous assault being facilitated by the 4th Respondent against it through craft and novation to have its factory shut down by the Authorities on the allegations that it is violating the law by manufacturing and selling alcohol to school children so as to facilitate its smooth and unauthorized development of the school by the 3rd Respondent albeit even without a Licence as required by the law and this is an actual and imminent threat.

6. Together with the petition, the petitioner filed an application for conservatory order seeking to stop any further enrolment and or advertisements to the general public on the commencement of the 3rd Respondent's School Campus at Great Wall Gardens Housing Development pending the hearing and determination of this petition.

7. According to the Petitioner, its sister company, Galot Industries Limited was hitherto the owner of a large plot which was allocated to it in 1982 within an area zoned off for industrial development in Athi River. However, in order to meet some of its financial obligations it subdivided the said parcel into several plots some of which it sold to Kenya Commercial Bank Ltd after which it commenced major industrial development on the remaining plots particularly LR No. 12867/9 neighbouring LR 12867/8 where it set up a distillery factory plant in 1986. Apart from the petitioner's plant several other industrial plants have been established thereat.

8. However, in 2016, the 4th Respondent commenced massive construction of several residential apartments known as Great Wall Gardens Housing Development Phases 1, 2 and 3 in the neighbouring parcel which unknown to the petitioner had been converted from industrial development to mixed use including residential plots without taking or soliciting any views from the petitioner as the immediately affected persons.

9. According to the petitioner, the 4th Respondent has continued to be driven by the singular motive to have the petitioner's distillery shut down. It was this state of affairs that led to the filing of the aforesaid appeal before the National Environment Tribunal. The petitioner fears that if the 3rd Respondent is allowed to commence the proposed learning at the suit property in utter violation of the law, then there is a real threat that the 4th Respondent, Erdermann Property Limited, will facilitate a fresh round of assault against the Petitioner to have its factory shut down by the authorities on the allegations that it is violating the law by manufacturing and selling alcohol to school children. Such an action, it is contended with amount to a violation of the petitioner's constitutional rights.

10. It is that basis that the petitioner seeks the conservatory orders herein.

11. The application is however opposed by the 3rd and 4th Respondents.

12. In opposing the application, the 3rd Respondent contended in summary that the School premises are part of the Great Wall Gardens Estate Property-Phase 1 which were approved for development by the County Government of Machakos by a developmental permission issued on 30th September 2015. In addition, the School premises and the entire project aforesaid was approved by NEMA which issued an Environmental Impact Assessment Licence on 17th November 2015.

13. It was averred that after the 3rd Respondent lodged an Application for registration of the School to the 2nd Respondent, the 2nd Respondent dispatched the Department of Health and Emergency Services which issued it with a Health Clearance Certificate, and a Sanitary Inspection Report both of which confirmed compliance and recommended registration. The Quality Assurance and Standards Assessment team also inspected the premises and confirmed compliance before recommending that the 3rd Respondent's School be registered. The 3rd Respondent had at the time of inspection by the 2nd Respondent's teams, enrolled three hundred and five (305) pupils besides recruiting thirteen (13) teachers. It was the 3rd Respondent's position that the Petitioner's complaints with regard to failing to be consulted in respect of change of user ought to have been raised and argued before the Liaison Committee under the ***Physical Planning Act*** and the NET while its complaints with regard to registration of the 3rd Respondent's school ought to have been raised as an appeal to the Education Appeals Tribunal.

14. It was the 3rd Respondent's position that the provisions of Section 12(1)(c) of the ***Alcoholic Drinks Control Act*** have not been violated and that the Petitioner has not demonstrated violation of any constitutional rights nor a prima facie case with a likelihood of success. Further, the Petitioner has not demonstrated the loss which it may suffer in the event the orders sought are not granted and that public interest militates against the grant of the orders sought.

15. According to the 4th Respondent, this Petition has no legal or factual merit but has solely conjured up as part of the continuing elaborate attacks and onslaught of suits designed nefariously to punish the 3rd Respondent. To the 4th Respondent, the Petitioner, is certainly making good its threat to fiercely fight and lash back to frustrate and cripple any lawful venture the 4th Respondent, its subsidiaries and any of its partners engages in with a view to demanding that they cease and desist from complaining and challenging the Petitioner's hitherto unchallenged, unmitigated and un-remedied pollution in the larger Mavoko area.

16. According to the 4th Respondent, it is in fact the 4th Respondent which is the real victim of actual onslaught on its fundamental rights and freedoms since it is its rights that are sought to be abridged hence it is the one who is deserving of protection from the Court. It then went on to particularise instances which in its view evince the petitioner's unbridled pollution and based thereon, it contended that the Petitioner is demonstrably an undeserving party of the orders sought not just in its Petition, but also the instant Application since its admitted and documented violations militate against any grant of equitable discretionary orders; in addition to the absence merit in its petition and Application.

17. According to the 4th Respondent, the Petitioner (sic) is the registered owner of all that Parcel of land known as L.R No. 12581/14 situated at Athi River, Machakos County where it has embarked on the process of construction of a mixed use development known as Great Wall Garden Estate Phase III which shall comprise 576 units, parking spaces and shop units, this being the third phase of Great Wall Gardens I and II, which were developed on LR 12867/13, 27317/2 and have already been sold and occupied.

18. It was the 4th Respondent's case that it has demonstrably undertaken and received all lawfully required statutory and regulatory approvals in respect of its ALL subject developments including undertaking an elaborate EIA Study and lodging an EIA Project report against which EIA Licenses were lawfully issued.

19. It was therefore its case that this Petition and the instant Application therewith, are not only a most unfortunate abuse of court and legal process: but also a veil concealing vested malicious commercial interests of the Petitioner, masked as violations as opposed to furthering social justice or public interest objectives, which a Constitutional court cannot countenance. According to it, the Application fails the test/threshold set-out in **Center for Rights Education and Awareness [CREAW] and 7 Others vs. The Hon. Attorney General [2011] eKLR** for grant of conservatory Orders, as the Application neither demonstrates a prima facie case, but also that there is no a real danger or even imminence of harm/prejudice that the Applicant suffers, the supposed fears of a possible future "collusion with other governmental agencies to shut down the petitioner's distillery" is not only remote, hypothetical and speculative, it obtains from conjecture and possibilities *nay improbabilities* with no lawful premise. It was contended that the Application is anchored on the incredulous supposition that 'the Petitioner fears that the 4th Respondent will once again collude with other governmental agencies to shut down its distillery for manufacturing and selling alcohol within a very close proximity" to a school, a regretted misapprehension and misadvise on the import of section 12, ***Alcoholic Drinks Control Act***, which concerns licensing of premises for consumption of alcohol and alcoholic drinks such as bars and restaurants, which the Applicant is not.

20. It was therefore contended that both the Petition and Application do not disclose any arguable case, underserving of any grant of conservatory orders since there is absolutely no plausible nexus between the school by the 4th Respondent and the fears of the Applicant.

21. According to the 4th Respondent, it is a matter a great public notoriety that the 4th Respondent school was amongst the best nationally performing school in the 2019 Kenya Certificate of Primary Education (KCPE); with an established track record for excellence. Accordingly, public interest must lie in allowing the extension of these facilities to more desirous Kenyans since all lawful prerequisites have been sought and obtained, in the lead-up to the establishment of the school, indeed the Applicant has not demonstrated a single omission.

22. The 4th Respondent averred that since the right to be heard is not absolute, and as held by the Court of Appeal decision in ***Muchanga Investments limited V Safaris Unlimited (Africa) Ltd 2 Others Civil Appeal No 25 of 2002 [2009] KLR 229,*** this Application herewith is an unnecessary clog on the limited judicial resources.

23. There were other contentions which in my view are not material to the matter presently before this Court. However, the 3rd Respondent prayed that this Application be dismissed with costs, as the balance of convenience and lower risk of injustice lies in favour of dismissing the Application and fixing the Petition for an expeditious hearing.

24. Together with the replying affidavits, the Respondent filed notices of preliminary objections the gist of which were that the petition and the application contravene the mandatory provisions of sections 85 and 93 of the ***Basic Education Act***, Cap 14 of 2013, Article 159(2)(c) of the Constitution.

Determination

25. The substance of the preliminary objections is that there are alternative dispute resolution mechanism provided by statute which ought to have been resorted to by the petitioner herein hence this petition and the application are premature and incompetent. The objection is based on section 77 of the ***Basic Education Act, 2013*** which provides as follows:

> ***(1) Where the County Education Board is not satisfied that the institution has complied with the requirements set out under this Act the Board may reject the application and notify the applicant of the decision within thirty days.***
>
> ***(2) Any person aggrieved by the decision of the County Education Board under subsection (1) may appeal to the Education Appeals Tribunal within a period of thirty days of the decision.***

26. It is therefore clear that the only person who is empowered to move the Tribunal under section 77(2) of the said Act is a person aggrieved by the decision of the County Education Board rejecting an application to establish an institution offering basic education. The petitioner's position is actually the opposite. It contends that the institution ought not to have been licensed to operate. Accordingly, the said provisions do not assist it and it is not thereby barred from coming to this court as it has no remedy under the said section.

27. Apart from that, I have not been told that the remedies which the petitioner herein seeks in this petition can be granted by any of the tribunals referred to. In my view, where the alleged alternative statutory dispute resolution mechanisms are not adequate to cover both the substance of a party's case and the remedies a party seeks, that mechanism as far as the party is concerned becomes practically a mirage. In those circumstances, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) of the Constitution are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body is achieved. Therefore, where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament through the procedure provided under an Act of Parliament an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court the Court is perfectly within its rights to investigate the allegations. To fail to do so would be to engender and abet an injustice.

28. The law, it has been said, is a living thing and a court would be shirking its responsibility were it to say, assuming that there be no existing recognised remedy covering the facts of a particular case, "Why then, this must be an end to it". The law may be thought to have failed if it can offer no remedy for the deliberate acts of one person which causes damage to the property of another. See **Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238.**

29. Therefore whereas the existence of the alternative remedy and procedure may not necessarily oust the jurisdiction of the Court, the Court is perfectly entitled to take into account the existence of such a remedy and its efficacy in deciding whether or not to entertain a dispute.

30. Since the petitioner has no locus under the said provisions and it is not contended that what the petitioner seeks in this petition may be granted before the other relevant tribunals, I decline to terminate these proceedings *in limine* based on the said grounds. Accordingly, the preliminary objections fail and are dismissed.

31. As regards the application for conservatory orders, this court is not required-indeed it is forbidden- from making definite and conclusive findings of either fact or law. I will therefore refrain from making any determinations whose effect would be to prejudice the hearing of the main Petition. As **Musinga, J** (as he then was) in Petition No. 16 of 2011, Nairobi – **Centre For Rights Education and Awareness (CREAW) & 7 Others** stated:

> **"...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."**

32. The first issue for determination is therefore whether the applicant has established a *prima facie* case. 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, the applicant has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues.

33. In this case, it is contended that the decision to permit the 3rd Respondent to establish a school within the vicinity of the Petitioner's distillery is likely to lead to the closure of its plant since such a plant ought not to be near an educational institution. If the intention of the establishment of the said school is to lead to the closure of the petitioner's plant, it may well be probable that the petitioner's rights are threatened by the actions of the Respondents. Having considered the foregoing, it is my finding that considering the issues raised, this petition discloses *prima facie* arguable issues for trial. In other words, it cannot be said that the petition is wholly frivolous or unarguable at this stage.

34. Having passed the first hurdle, the second issue is whether the petitioner has satisfied the provisions of Article 23(3)(c) of the Constitution.

35. Article 23(3)(c) of the Constitution provides that in any proceedings brought under Article 22, a court may grant appropriate relief, including a conservatory order. In the Privy Council Case of **Attorney General vs. Sumair Bansraj (1985) 38 WIR 286 Braithwaite J.A**. expressed himself follows:

> **"Now to the formula. Both remedies of an interim injunction and an Interim declaration order are excluded by the State Liability and Proceedings Act, as applied by Section 14 (2) and (3) of the Constitution and also by high judicial authority. The only judicial remedy is that of what has become to be known as the "Conservatory Order" in the strictest sense of that term. The order would direct both parties to undertake that no action of any kind to enforce their respective right will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact. The order would not then be in the nature of an injunction, … but on the other hand it would be well within the competence and jurisdiction of the High Court to "give such directions as it may consider appropriate for the purpose of securing the enforcement of … the provisions" of the Constitution…In the exercise of its discretion given under Section 14(2) of the Constitution the High Court would be required to deal expeditiously with the application, inter partes, and not ex parte and to set down the substantive motion for hearing within a week at most of the interim Conservatory Order. The substantive motion must be heard forthwith and the rights of the parties determined. In the event of an appeal priority must be given to the hearing of the appeal. I have suggested this formula because in my opinion the interpretation of the word in Section 14 (2) "subject to subsection (3) and the enactment of Section 14(3) in the 1976 Constitution must have…the effect without a doubt of taking away from the individual the redress of injunction which was open to him under the 1962 Constitution. On the other hand, however, the state has its rights too…The critical factor in cases of this kind is the exercise of the discretion of the judge who must "hold the scales of justice evenly not only between man and man but also between man and state."**

36. The aforesaid principles were adopted by the High Court of the Republic of Trinidad and Tobago in the case of **Steve Furgoson & Another vs. The A.G. & Another Claim No. CV 2008 – 00639 – Trinidad & Tobago**. The **Honourable Justice V. Kokaram** in adopting the reasoning in the case of ***Bansraj*** above stated:

> **"I have considered the principles of *East Coast Drilling –V- Petroleum Company of Trinidad And Tobago Limited (2000) 58 WIR 351* and I adopt the reasoning of BANSRAJ and consider it appropriate in this case to grant a Conservatory Order against the extradition of the claimants pending the determination of this motion. The Constitutional challenge to the Act made in this case is on its face a serious one. The Defendant has not submitted that the Constitutional claim is unarguable. The Claimants contends that the Act is in breach of our fundamental law and the international obligations undertaken were inconsistent with supreme law. It would be wrong in my view to extradite the claimants while this issue is pending in effect**

and which will render the matter of the Constitutionality of the legislation academic."

37. Back home, **Musinga, J** (as he then was) in Petition No. 16 of 2011, Nairobi – **Centre for Rights Education and Awareness (CREAW) & 7 Others** stated that:

> **"...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."**

38. In **The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012**, it was held by a majority as follows:

> **"In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission."**

39. In **Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR** this Court expressed itself as follows:

> **"Conservatory orders in my view 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."**

40. This position was reinforced by the Supreme Court in **Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Ors [2014] eKLR** where the highest Court in the land held:

> **"'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 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 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 stay of execution, the appellant, or intending appellant, must satisfy the Court that:**
>
> **(i) the appeal or intended appeal is arguable and not frivolous; and that**
>
> **(ii) 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:**
>
> **(iii) 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 run through the Constitution."**

41. In considering whether or not to grant conservatory order, it is my view that the principle of proportionality plays a not remote role. As was stated by **Ojwang, AJ** (as he then was) in **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589** the Court, 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".**

42. Dealing with the circumstances under which the Court would grant conservatory orders the Supreme Court in ***Munya's Case*** (supra)

expressed itself as follows:

> **"Bearing in mind the nature of the competing claims, against the background of the public cause, we have focused our perception on the public interest, and the concept of good governance, that runs in tandem with the conscientious deployment of the scarce resources drawn from the public. Proper husbandry over public monetary and other resources, we take judicial notice, is a major challenge to all active institutions and processes of governance; and the Courts, by their established attribute of line-drawing, must ever have an interest in contributing to the safeguarding of such resources… These principles dictate that our conscientious sense of proportions, stands not in favour of allowing the conduct of fresh elections for Meru County's gubernatorial office, during the pendency of an appeal. By our sense of responsibility, the Court's contribution to good governance in that context, takes the form of an expedited hearing for the appeal. Just that."**

43. The Petitioner having surmounted the first hurdle by proving that he has a prima facie case, the next question is whether there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution. What amounts to real danger was dealt with by **Mwongo, J** in **Martin Nyaga Wambora vs. Speaker of The County of Assembly of Embu & 3 Others [2014] eKLR**, where expressed himself as follows: -

> **"To those erudite words I would only highlight the importance of demonstration of "real danger". The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention."**

44. According to the Respondents, the area in question is now a mixed user development area with residential premises and that within the said premises are children hence it cannot be said that the establishment of the 3rd Respondent's School is a new phenomenon in the area. Further the distance between the petitioner's plant and the 3rd Respondent's institution and their access are not placed in such a manner as to be construed that the students studying in the 3rd Respondent's institution will be exposed to the products manufactured in the petitioner's plant which in any case does not retail its products.

45. I have considered all the factors and weighed the cases for the respective parties as well as the rights and interests of third parties. In my view, to grant the conservatory orders in the manner sought herein would be too drastic and its effect would be to adversely affect third parties who are not before me without them being afforded an opportunity of being heard. Therefore, without deciding with finality the issues raised in this petition, I am not satisfied that there is real danger that the Petitioner will suffer prejudice as a result of the alleged threatened violation of its constitutional rights.

46. It is also trite that the decision whether or not to grant conservatory orders being discretionary, the party seeking them must move the Court with alacrity and ought not to be guilty of laches. Therefore, a claim for conservatory orders ought to be made promptly, timeously and without delay. This was the position adopted by this Court in **Matatu Welfare Association (Suing Through Its Registered Officials Namely & 3 Others vs. Cabinet Secretary for Transport and Infrastructure & 6 Others [2015] eKLR** where it was held that:

> **"a party seeking the conservatory orders must also do so as soon as the threat of violation to his rights is brought home to him. Where a party waits until the last minute to bring the application, the Court may frown upon such conduct and may decline to grant such an applicant the reliefs he or she seeks."**

47. Similarly, in **Robert N Gakuru & Another vs. Governor Kiambu County & 3 Others [2013] eKLR** this Court held that:

> **"With respect to the need to move the Court expeditiously the law acknowledges the need for speedy certainty as to the legitimacy of target activities and requires petitioners to act promptly to avoid frustrating a public body whose decision is challenged, particularly because of public interest. Therefore in order to qualify for the grant of the conservatory orders sought the application must be made promptly hence undue delay in applying is a major factor and the needs of good administration must be borne in mind as courts cannot hold decision making bodies hostage. See Kithome vs. The District Land Adjudication & Settlement Officer Mwingi District & Others Nairobi HCMA. No. 1108 of 2004 [2006] 1 EA 116 and Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728. I therefore associate myself with the decision of Musinga, J (as he then was in Republic vs. City Council of Nairobi & Another ex parte Peter Odoyo & Another Nairobi High Court Judicial Review Case No. 25 of 2011 that decisions with financial implications must be challenged promptly failing which orders seeking to stay such decisions may not be granted even where otherwise deserved."**

48. In this case, the premises in question seems to be complete and are simply awaiting occupation. Steps have been taken to facilitate such occupation and the institution is due to start operation in a few days' time. To grant the orders sought in the instant application will not only throw the operations of the said institution into disarray but is likely to violate the rights of others to education particularly at this eleventh hour. While that may not necessarily bar the Court from granting conservatory orders, it is certainly a factor to be taken into consideration in deciding whether or not to exercise the court's discretionary jurisdiction favourably.

49. It is therefore my view that to grant the conservatory orders in the circumstances of this case would be disproportionate to the mischief that is sought to be cured by such orders.

50. In the premises I decline to grant the conservatory orders sought herein. However, the 3rd Respondent is hereby directed to ensure that pending the hearing and determination of this petition, the pupils learning at its institution within the subject premises are not unduly exposed to the products being manufactured by the petitioner.

51. Costs will be in the cause.

52. It is so ordered

Read, signed and delivered in open Court at Machakos this 3rd day of January, 2020.

G V ODUNGA

JUDGE

In the presence of:

Mr Tiego and Miss Maumbu for the Petitioner.

Mr Nyaburi for the 3rd Respondent

Mr Lusi for the 4th Respondent

CA Geoffrey.