



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

PETITION NO. 3 OF 2020

IN THE MATTER OF ARTICLES 1,2,3, 10,20,23,42,43,50,56,69,159 & 165 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE CONTRAVENTION OF ARTICLES 2,10,42,56,63,69,73 &75 OF THE CONSTITUTION OF KENYA 2010

AND

TENDER NO. CDA T 016/2019-2020 FOR THE CONSTRUCTION OF A WATER PAN IN FALMAGALLA DIVISION FAFI SUB-COUNTY, GARISSA COUNTY

BETWEEN

HON ABDIKHAIM MOHAMED OSMAN.....PETITIONER

VERSUS

COAST DEVELOPMENT AUTHORITY.....RESPONDENT

AND

YUSUF OMAR ABDI.....1ST INTERESTED PARTY

NUR LEBI IBRAHIM.....2ND INTERESTED PARTY

ABDI RASHID HAJI IBRAHIM.....3RD INTERESTED PARTY

ABDULLAHI ABDI SAMATHE.....4TH INTERESTED PARTY

MUSE DUBAT ABDULLE.....5TH INTERESTED PARTY

YAKUB ABDI SHURIYE.....6TH INTERESTED PARTY

ADEN GELLE ALLI.....7TH INTERESTED PARTY

BARWAQO SOMANE GURE.....8TH INTERESTED PARTY

RULING

BACKGROUND

1. The Petitioner, Hon. Abdikharim Mohamed Osman filed this petition contemporaneously with the Notice of Motion dated 10th June, 2020 under Section 13 of the Environment and Land Court, Rule 19 & 23 of the Constitution of Kenya (protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 Section 10 of the Judicature Act, Cap 8 of the Laws of Kenya and all other enabling provisions of the law. The Petitioner/Applicant sought the following interim conservatory orders;

(i) Spent.

(ii) **THAT this Honourable Court do issue a conservatory order restraining the Respondent from proceeding with opening, evaluating or awarding any tender as advertised on 22nd May 2020 for Tender CDA T 016/2019-2020 for the construction of a water pan in Galmagalla Division, Fafi Sub-County.**

2. When the Notice of Motion was placed before me on 12/6/2020, the same was certified urgent and directed that it be served for interparties hearing on 24/6/2020. The court also granted temporary conservatory orders pending the interparties hearing.

3. On 18th June, 2020, the Respondent instructed the firm of M.N Mwanyale & Co. Advocates who filed a notice of Appointment on 19/6/2020. The Respondent through their Managing Director one Mohamed Hassan Keinan also filed a replying affidavit in response to the Petitioner's/Applicant's application.

4. On the same day, the Respondent filed another application under certificate of urgency seeking to discharge the conservatory orders issued on 12/6/2020. Again on the same 19/6/2020, the eight (8) Interested Parties in this case filed a Notice of Motion under Order 1 Rule 10 Section 3A CPA and Rule 7 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) seeking leave to be enjoined as parties in this suit. The eight Interested Parties also attached a proposed supporting affidavit.

5. When the matter was placed before me and upon hearing all the parties through their Counsels, the application by the eight Interested Parties was allowed by consent and their proposed replying affidavit was deemed as properly filed and served upon payment of the requisite court fees. The following directions were also taken;

(a) The Notice of Motion by the Respondent dated 18/6/2020 to be heard simultaneously with the Notice of Motion by the Petitioner dated 10/6/2020 on 24/6/2020.

(b) The Applicant in the first Notice of Motion dated 10/6/2020 is hereby granted leave to file and serve a supplementary affidavit before close of business on 23rd June 2020.

PETITIONER'S CASE

6. The Petitioner's/Applicant's position is that water pan projects were initiated at the request of the political leadership in Garissa through a Memorandum dated 18th December 2019 to the President seeking support in four critical areas to wit; water, energy, roads and opening of Kenya Somali boarder for trade.

7. The Petitioner deponed that he also personally requested the President for the construction of a "peace dam" in his Constituency to assist his constituents to get water for their domestic use and livestock as pastoralists to secure peace among the communities in the constituency.

8. The Petitioner/Applicant also stated that most ideal location for the construction of a water pan in Fafi constituency would be at Dagega plains at the border of Dekaharja and Bura wards. He contends that the area is the one preferred by the residents and expert analysis of the soil in the area has established that black cotton soil is arable and viable for irrigation as well as creating watering pans for livestock.

9. The Petitioner/Applicant further stated that Dagega plains is far removed from the border area which is affected by insecurity and therefore would benefit the residents more than the proposed site at Galmagalla in Dekaharja ward.

10. He stated that having been informed of the attempts to hijack the project for selfish reasons, he wrote letters of complaint dated 30th April, 2020 to the Ministry of Water, Sanitation and Planning as well as the National Treasury and Planning but there has been no response.

11. The Petitioner further stated that the Respondent advertised a Tender Notice on 22nd May 2020 being CDA T 016/2019-2020 for the construction of a water pan in Galmagalla division Fafi Sub-county, Garissa County. Confirming his apprehension that the whole procurement process has been skewed for partisan interests and not the interests of the residents of Fafi constituency.

12. The Petitioner/Applicant also contends that there was no public participation prior to Galmagalla ward being identified for the water pan project and that he knows of his knowledge that the Respondent's Chief Executive Officer hails from Galmagalla Sub-county and therefore irregularly and unlawfully identified his village for the construction of the water pan contrary to Articles 73 and 75 of the Constitution.

13. The Petitioner/Applicant also stated that Article 63 (3) of the Constitution provides that any unregistered community land shall be held in trust by County Government on behalf of which it is held. He stated that the Respondent in purporting to undertake the construction of the water pan project on community land without consent or approval of Garissa County Government is therefore in violation of the Constitution.

14. The Petitioner also stated that by a letter dated 5th June, 2020 from the Garissa County Executive Committee Member, Lands, Housing, Public Works and Urban Development, the Respondent was requested to suspend the Tender for construction of the water pan at Galmagalla Sub-county but has ignored the same.

15. The Petitioner stated that there was no environmental impact assessment undertaken nor was there any community participation to determine the most appropriate location for the construction of the water pan and that the Respondent has not consulted National Government in the construction of the water pan.

16. In his further affidavit sworn on 24/6/2020, the Petitioner/Applicant reiterated his earlier contention that there was no public participation as required by law. He stated that the Respondent did not advertise nor issue notices for public views on where the dam should be constructed.
17. The Petitioner further deponed that although there was a report submitted by the National Drought Management Authority in June 2016, the same does not meet the qualitative nor the quantitative test set out by precedents for public participation.
18. The Petitioner also stated that the request by the local community is only part of the consideration when undertaking mandatory public participation as required under the Constitution and that the public participation should have involved the whole of Fafi Constituency.
19. The Petitioner deponed that as the Respondent and the Interested Parties have confirmed that the Environmental impact assessment was undertaken in May 2020 and that NEMA is yet to issue a licence as required under the Environmental (Impact Assessment and Audit) Regulations 2003, the construction project is therefore premature and should only be undertaken after a licence has been issued under Section 58 (1) of the Environment Management and Co-ordination Act.
20. The Petitioner further stated that it is not true that the project was proposed in the year 2016 as claimed otherwise the Respondent could have had ample time to undertake public participation and time to secure the NEMA licence before advertising the project for tender.
21. The Petitioner also stated that the claim that funds were allocated at the request of the Interested Parties is certainly not correct. He stated that the 1st Interested Party Yussuf Omar Abdi plays an important role in the community but his influence is at the Garissa County Assembly and has no means to engage His Excellency the President for projects undertaken at the constituency level.
22. He stated that he has not discriminated against some of the residents of Fafi constituency and that his efforts are to ensure that a water project benefits all the residents of Fafi constituency.
23. The Petitioner further stated that Galmagalla has ten water pans with three at Dekaharja, two at Ela, three at Galgamalla and two at Gubia. He stated that the construction of a mega dam therefore has to be considered in light of the needs of the rest of the constituency to provide water for irrigation and it needs to be centrally located.
24. The Petitioner also stated that he has no interest in blocking the project which if implemented properly will benefit his constituency and that his concern is to ensure that any public funds are utilized prudently and in the best interest of the residents of Fafi Constituency.
25. In conclusion, the Petitioner proposed that if the project is to be allowed to proceed, the court should grant a structural interdict to ensure that before the construction commences, there is public participation, consultation with the County Government where necessary and a licence from NEMA to undertake the project.

RESPONDENT'S CASE

26. The Respondent through her replying affidavit by Dr. Mohamed Hassan Keinan sworn on 18/6/2020 states as follows;
27. That as a State corporation, the Respondent undertakes various development projects within 7 counties including the county of Garissa either alone or in partnership with other state agencies.
28. That the intended project to be implemented in Dekaharja ward, one of the five wards within Fafi Constituency was requested by the National Drought Management Authority vide a letter dated 14th June 2016 and is now being considered for implementation.
29. That the project was conceived in 2016 and not 2019 as alleged by the Petitioner and that the same is now being considered for implementation in the current financial year.
30. That Dekaharja ward is bordered by Hulugho and Sangailu wards to the East which wards are situated in Ijara Sub-county and is equally bordered by Bura ward to the West and is approximately 62 KMS from the Somali border.
31. That there already exist a water pan in Dagega plains area whose construction was financed by the Respondent in 2014.
32. That there already exist a water pan in Biya Gadud whose construction was financed by the Respondent in 2014.
33. That both Dagega plains and Biya Gadud are in Fafi Constituency.
34. That administratively Dekaharja ward is also called Galmagalla and that it is situated about 142 KM away from a permanent water source, which is River Tana currently its main water source is small water ponds that harvest water during the rainy season.
35. That public participation for this project was undertaken in 2016 by the National Drought Management Authority who submitted its report to the Respondent and requested for funding of the said project.
36. That the local community has separately requested for the project through its area MCA and the Chief via letters dated 4th June 2019 and 1st July 2019.

37. That having financed the construction of water pans in Bura and Dagega plains, he verily believes that the area residents and their livestock have reasonable access to water as opposed to the residents of Dekaharja ward who requested for the project.
38. That an Environmental Impact Assessment was conducted through by their Environmental Experts and the National Environmental Management Authority in May 2020 before the advertisement of the tender was done.
39. That public participation was conducted through a feasibility project by the National Drought Management Authority in 2016 and the report is that they have not breached Article 73 and 75 of the Constitution.
40. That Environmental Impact Assessment was also conducted in May 2020 before the advertisement for the tender was issued.

Application for Discharge of conservatory orders dated 18th June 2020

41. The Respondent in her application for the discharge of the conservatory orders issued on 12/6/2020 stated as follows;
42. That I have no personal interest in the construction of water pan in Dekaharja ward and that he comes from Bura ward.
43. That the Honourable Court was misled into believing that no public participation had been concluded while the intended project to be implemented in Dekaharja ward was requested by the National Drought Management Authority vide a letter dated 14/6/2016.
44. That the local community has separately requested for the project through its area MCA and the Chief via letters dated 4th June 2019 and 1st July 2019.
45. The Honourable Court was further misled that no Environmental Assessment Report was done while the report was done.
46. That the time lines of Government Procurement Procedures are that if a project is not implemented by close of the financial year which is 30th June 2020 the funds will revert to treasury, hence the urgent need to have the procurement process proceed before close of the financial year which cannot proceed in view of the orders in place.
47. That the conservatory orders herein so far as they stop the award of the tender, this will cause hardship to the detriment of the residents of Galmagalla in whose favour the water pan is intended to be implemented.

INTERESTED PARTIES CASE

48. The Interested Parties through Yussuf Omar Abdi deponed as follows;
49. That the Petitioner's application is founded on baseless and false apprehension and misinformation, bad faith to grapple the socio-economic development of the residents of Galmagalla and does not disclose a prima facie case.
50. Galmagalla location in Dekaharja ward is located over 100KM from Bura town where the River Tana flows and has no underground water. The area relies on surface run off water harvested into small water pans during rainy season which dries up when hit by drought.
51. That the National Drought Management Authority in a detailed contingency plan report on Dekaharja ward, prepared in April 2016 and held at Galmagalla Trading Centre has identified the perennial water shortage which may spark conflicts over the limited resource. The report was prepared with maximum participation and consultation with the residents.
52. Following the report, the community leaders and residents have made numerous appeals to the Petitioner and the County Government of Garissa to address the water issue to no avail.
53. The residents through his office wrote a letter to the Managing Director of the Respondent dated 4th June 2019 appealing for construction of a mega dam for sustainability to the lives and livelihoods of the residents of the ward.
54. That similarly the residents and the Development Committee Members in the area through the office of the area Chief wrote another letter to the Managing Director of the Respondent regarding the perennial water shortage in the area and appealed for support.
55. That the Respondent by a report dated 25th April 2020 conducted an identification and feasibility study in the area and identified Galmagalla as the ideal place for construction of the Mega dam since it satisfies all the site selection criteria for pans/dams.
56. That Respondent conducted adequate public participation and wide consultation with stakeholders and residents and prepared a detailed Environmental and Social Impact Assessment Report in May 2020 in line with Section 58 of the Environmental Management and Coordination Act and the Environmental (Strategic Assessment and Audit) Regulations, 2015 and submitted the same for approval and issuance of licence by the National Environmental Management Authority.
57. That based on the numerous appeals for construction of a mega dam and detailed feasibility study the Respondent on 22nd May 2020 advertised a tender Notice being CDA T 016/2019-2020 for the construction of a water pan in Galmagalla Division, Fafi Sub-county, Garissa County and that the Respondent has sufficiently engaged the residents of Galmagalla and conducted adequate public participation, feasibility

study and Environmental Impact Assessment.

58. That the proposed water pan is of 350,000m³ capacity and is projected to improve livelihoods , supply water for domestic use to about 3200 people and support about 500,000 livestock promoting the right to clean and safe water in adequate quantities under Article 43 of the Constitution. Implementation of the project will markedly increase water availability and livelihood of livestock and farmers thereby enhancing food and nutrition security as stipulated in the Big 4 agenda.

59. The Petitioner who is the Member of Parliament for Fafi Constituency hails from Rer Kassim sub clan of Abduaq who predominantly reside in Bura Nanighi Wards. In Dekaharja/Galmagalla wards, Rer Harun sub clan of Abdiaq are the predominant residents.

60. Since his election in 2017, the Petitioner has developed a discriminatory and lukewarm approach towards the residents of Galmagalla despite getting a sizeable vote from the area which was perceived to be his opposition stronghold. There is no meaningful development initiated by the Petitioner and his opposition to the construction of the water pan in the area is meant to perpetuate his discrimination against the residents of the area and cripple them economically.

61. That the implementation of the project will fundamentally improve the lives and livelihood of the residents of Galmagalla and promote their socio-economic right to clean and safe water in adequate quantities and to be free from hunger, and to have adequate food of acceptable quality under Article 43 of the Constitution.

62. The Petitioner's issues with the construction of the water pan in Galmagalla are political selfish and baseless as wide consultation and public participation, feasibility study and ESIA were conducted.

63. The residents of Galmagalla have on numerous occasions brought to the attention of the County Government of Garissa and the political leadership, the perennial water problem in the area and have requested to have the issue resolved which appeal has fallen in deaf ears.

64. The Petitioner's application and petition is premature, incompetent and misconceived as he has not exhausted the local available remedies.

65. The interim orders issued by this Honourable Court restraining the Respondents from the evaluation and award of tender for the construction of the Galmagalla water pan were granted in deliberate and gross non-disclosure of material fact and ought to be vacated and should not be extended.

SUBMISSIONS BY PETITIONER

66. The counsel for the Petitioner Mr. Issa submitted that his client who is the Petitioner herein is not opposed to the construction of the dam in Fafi Constituency but are only challenging the manner in which the process has been advertised. He submitted that there was no public participation as to where the project should be undertaken. Counsel submitted that there should have been advertisement to invite residents and members of the public. Secondly, counsel submitted that at the time, the Respondent had not gone through the Environmental Assessment Process and obtained a licence. Thirdly, counsel submitted that water is a devolved function and that the project should have been done in conjunction with the County Government of Garissa. He cited the following authorities;

(1) *Constitution of Kenya, 2010.*

(2) *Environmental Management and Co-ordination Act No. 8 of 1999.*

(3) *Environment and Land Court Act No. 19 of 2011.*

(4) *Environment (Impact Assessment and Audit) Regulations 2003.*

(5) *Cortec mining Kenya Limited Vs Cabinet Secretary Ministry of Mining & 9 Others (2015) eKLR.*

(6) *Republic Vs Cabinet Secretary Ministry of Agriculture, Livestock & Fisheries & 4 Others Exparte council of County Governors & Another (2017) eKLR.*

(7) *British American Tobacco Kenya (formerly British American Tobacco Kenya Limited) Vs Cabinet Secretary for the Ministry of Health & 2 Others; Kenya Tobacco Control Alliance & Another (Interested Parties); Mastermind Tobacco Kenya Limited) The affected parties (2019) eKLR.*

(8) *Okiya Omtatah Okiiti & Another Vs The Attorney General & 4 Others; The Law Society of Kenya Vs The Hon. Attorney General & 5 Others (consolidated) 2020 unreported.*

SUBMISSIONS BY RESPONDENT

67. The Respondent did not file written submissions but made oral submissions and argued that there was public participation which was conducted in 2016. The Learned Counsel submitted that there is a forwarding letter by the National Drought Management Authority and that the request was also made by other members of the public in Galmagalla area prior to the commencement of the project. He submitted that if the project is not undertaken by the end of this financial year ending on 30/6/2020, the funds will be returned to treasury.

SUBMISSIONS BY THE INTERESTED PARTY

68. The counsel for the Interested Party Mr. Kusow associated himself with the submissions by Mr. Mwanyale for the Respondent and sought to have this application dismissed and the conservatory orders issued on 12/6/2020 discharged to allow the project do proceed. He relied in the following authorities;

- (1) *The Constitution of Kenya, 2010*
- (2) *The Environmental Management and Coordination Act No. 8 of 1999*
- (3) *Constitutional Petition No. 305 of 2012, 34 of 2013 & 12 of 2014 (formerly Nairobi Constitutional Petition No. 43 of 2014) (consolidated) Mul Coal Basin Local Community & 15 Others Vs Permanent Secretary Ministry of Energy & 17 Others (2015) eKLR.*
- (4) *Muslims for Human Rights (Muhuri) & 4 Others Vs Inspector General of Police & 2 Others (2014) eKLR.*

ISSUES FOR DETERMINATION

69. After going through the interlocutory applications and the oral submissions by the counsels representing the parties before the court, I can identify the following issues raised in the two applications for determination;

- (a) Whether the threshold for the Constitutional principle of right to public participation was in identifying Galmagalla as an appropriate site in the construction of the mega dam.
- (b) Whether the Respondent being a state organ failed to adhere to the principles set out under Article 73 and 75 of the Constitution of Kenya 2010.
- (c) Whether the tender for the construction of a water pan in Galmagalla Division on 22nd May 2020 for tender CDA T 016/2019-2020 is lawful?
- (d) Whether the tender for the construction of the water pan at Galmagalla being CDA T 016/2019-2020 meet the underpinning provisions of the law for implementation within the current financial term?

ANALYSIS AND DECISION

70. Whether the threshold for the Constitutional principle of right to public participation was met in identifying Galmagalla location within Garissa County as an appropriate site for the construction of the water pan.

In order to address this issue, it is important to refer to Article 10 of the Constitution which is the applicable law which reads;

“10 (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) Applies or interprets this Constitution

(b) Enacts, applies, or interprets any laws; or

(c) Makes or implements public policy decisions.

2. The National values and principles of governance include:-

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non discrimination and protection of the marginalized.

(c) good governance, integrity, transparency and accountability; and

(d) Sustainable development.”

71. The courts in this country have pronounced itself on the guiding principles in applying that Article. In the Case of **John Muraya Mwangi & 495 Others & 6 Others Vs Minister for Provincial Administration & Internal Security & 4 Others (2014) eKLR** Emukule J. (as he then was) discussed public participation as follows;

“The concept of public participation enshrined in Articles 10 and 12 of the Constitution of Kenya 2010, is a difficult one but

needs to be given effect both before and after legislative enactment. This may take several forms -

- (i) the concept envisages political participation in the conduct of public affairs, such as the right to vote, and to be elected or appointed to public office,
- (ii) the right to be engaged in public debate and dialogue with elected representatives at public hearings,
- (iii) the duty to facilitate public participation in the conduct of public affairs,
- (iv) ensuring that ordinary citizens the “hoi polloi,” the “lala hoi” have the necessary information and are given opportunity to exercise their say not merely in election and appointment to political office but also economic participation, and conduct of their affairs.”

72. But this begs the question on the methods or mechanisms for achieving public participation in the conduct of political and economic affairs of the country. Again the South African experience (para. 80) **Merafong Demarcation Forum and Others Vs The Republic of South African and Others (OCT. 41/67) (2008) ZACC 10** is of essence. The obligation to facilitate public involvement may be fulfilled in different ways. “It is open to innovation” our emphasis. Legislative procedures are alien to ordinary citizens, more so to rural folk. The County Commissioners and their deputies must mobilize their chief agents, the chiefs and inform ordinary citizens of impending legislation that would affect their welfare or the way they conduct their businesses. Such meetings or “Barazas” must be documented and reduced into reports to the relevant ministries or state agencies as records of public participation. The print and electronic media ought to give prominence to such public participation in respect of every county or sub-county. The media have that mandate under Article 34 of the Constitution on the freedom of the media. Invitation to file memoranda by ordinary citizens, and records thereof be kept. Innovation is the name of the game to give effect to the concept of public participation. There are Rwandan Government documentations showing H.E Kagame, the President of Rwanda with shirt sleeves rolled up attending public barazas at county and even sub-county levels and listening to questions and issues and requiring the relevant technocrats or bureaucrats to answer them. Such occasions are absent among our relevant Cabinet Secretaries, and their Principal Secretaries. Let the Cabinet Secretary go to every county and seek citizens views on the new legislation in particular that which would affect the way they conduct their affairs.

73. Again in the case of **Robert N. Gakuru & Others Vs Governor, Kiambu County & 3 Others (2014) eKLR** Justice Odunga cited with approval the South African case of **Doctors for Life International Vs Speaker of the National Assembly and Others** and stated as follows;

“In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as may for as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action.”

74. Turning to this case, the Respondent has attached a letter by the National Drought Management Authority addressed to her requesting for funding of the proposed project way back in the year 2016. The proposal letter is further attached with a list of about 232 names and signatures indicated as elders. There is no indication where the people come from and the reasons for the signatures. There’s no question(s) framed for which they had to sign on the list. The project is intended for both the elites who can read and write as well as “Wanjiku” and “Halima” who are livestock herders in the villages who may not know how to read or write. There is no indication that those kind of constituents were involved in the identification of the site for the proposed project. There is also no evidence that there was any notice to the residents living within the proposed site notifying them of the proposed project. To my mind, these are weighty but serious issues that show no public participation was conducted before the site for the proposed project was identified.

75. **Whether the Respondent being a state organ failed to adhere to the principles set out under Articles 73 and 75 of the Constitution of Kenya, 2010.** In Order to deal with the issue appropriately it is imperative to put into perspective the provisions of Articles 73 and 75 of the Constitution which is the applicable law as follows;

“73 (1) Authority assigned to a State officer—

- (a) is a public trust to be exercised in a manner that—
- (i) is consistent with the purposes and objects of this Constitution;
- (ii) demonstrates respect for the people;
- (iii) brings honour to the nation and dignity to the office; and
- (iv) promotes public confidence in the integrity of the office; and

- (b) Vests in the state officer the responsibility to serve the people, rather than the power to rule them.
- 2) The guiding principles of leadership and integrity include—
- (a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;
- (b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;
- (c) selfless service based solely on the public interest, demonstrated by—
- (i) honesty in the execution of public duties; and

- (ii) the declaration of any personal interest that may conflict with public duties;
- (d) accountability to the public for decisions and actions; and
- (e) discipline and commitment in service to the people.

76. The Applicant in this case has accused the Respondent's Chief Executive Officer for choosing to construct the proposed project at Galmagalla where he comes from. The Respondent has also made counter-accusation against the Petitioner/Applicant for discriminating against people who are from other clans and perceived to be his opposition zone. These are matters that court not be appropriately decided upon at interlocutory stage by way of affidavit evidence. They are serious allegations that need to be determined at the main trial.

77. Whether the tender for the construction of water pan in Galmagalla Division on 22nd May 2020 for tender CDA T 016/2019-2020 is lawful? The provision of water and construction of dams which is the subject of this petition is a devolved function as set out under the fourth schedule of the Constitution of Kenya, 2010. A devolved function is undertaken either by the County Government concerned or in conjunction with any other partner. In this case, there is no indication that the County Government of Garissa was even involved in the identification of the site and even consulted in the tender for the construction of the water pan being tender CDA T 016/2019-2020.

78. The County Government of Garissa is crucial party in this petition and ought to have been involved in the first instance. Failure to involve the County Government in the proposed project which is a devolved function in my view is serious since the proposed site for the construction of the water pan is a community land which is held by Garissa County Government for the benefit of the residents of the area as provided for under Article 63 (3) which states thus;

“Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.”

79. The land in which the water pan is proposed to be constructed is a community land. It was therefore untenable to proceed with the tender for the construction of a project without involving the County Government of Garissa.

80. Whether the tender for the construction of the water pan at Galmagalla being CDA T 016/2019-2020 meet the underpinning provisions of the law for implementation within the current financial term?

The Respondent submitted that this court should allow the Notice of Motion dated 18th June 2020 brought under Certificate of Urgency and discharge the conservatory orders to enable the construction of the project proceed before the end of the current financial year on 30/6/2020.

81. I have made my findings on the issues in controversy in the two applications with a resounding observation that there was no meaningful public participation conducted in identifying the proposed construction site with the people of Garissa for their views to be considered.

82. I also hold the view that the land where the project is intended to be constructed is a community land which is held by the County Government of Garissa in trust for the residents and the people of Garissa. Without involving them in the proposed project makes the project dead on arrival. These irregularities are not mere irregularities but are fatal to the project in my view. The parties have submitted that the proponent of the project can be given 14 days to regularize their position since the financial year is coming to an end. In my view, the issues the court has identified as flawed in the process leading to the issuance of tender No. CDA T 016/2019-2020 for the construction of the water pan in Galmagalla are such that it cannot be rectified in less than five days. The irregularities are such that conducting a public participation require a meaningful time to achieve qualitative and quantitative results.

83. For all the reasons I have given, I find the application dated 10th June 2020 merited. By implication, the Notice of Motion by the Interested Parties dated 18th June, 2020 fails. The conservatory orders issued on 12th June 2020 is hereby confirmed pending hearing and determination of the main petition. Costs shall be in the course.

It is so ordered.

Read, delivered and signed in the Open Court this 26th day of June, 2020.

.....

E. C Cherono (Mr.)

ELC JUDGE

In the presence of:

1. Mr. Issa: For the Petitioner.
2. Mr. Mwanyale: For the Respondent.
3. Mr. Kusow: For the Interested Party.
4. Fardowsa (Court Assistant)