

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CONSTITUTIONAL PETITION NO. E013 OF 2025

BONIFACE
MASINDE.....PE
TITIONER

VERSUS

THE HON. ATTORNEY
GENERAL.....1ST RESPONDENT
THE CABINET SECRETARY AGRICULTURE AND LIVESTOCK
DEVELOPMENT.....
...2ND RESPONDENT

KENYA SUGAR
BOARD.....INTERESTED
PARTY

RULING

1. The Petitioner seeks conservatory orders restraining the conduct of elections of growers’ representatives to the Kenya Sugar Board under the delineation of catchment areas provided in the First Schedule of the Sugar Act, 2024, pending hearing of the Petition.
2. The Respondents and the Interested Party oppose the application through affidavits and written submissions.
3. The Court has considered the material before it, the applicable law, and submissions from all parties.
4. The issues for determination are:
 - a. Whether the Applicant meets the threshold for grant of conservatory orders.

- b. Whether public participation, discrimination, or legislative irregularities have been demonstrated at this stage.
 - c. Where the balance of public interest lies.
5. The issue for determination is whether the application meets the threshold for the issuance of conservatory orders. The principles for granting conservatory orders were stated in the case of **Board of Management of Uhuru Secondary School -vs- City County Director of Education and 2 Others (2015) eKLR** where the court summarized the principles for the grant of conservatory orders and stated as follows:

“(i)The needs for the applicant to demonstrate an arguable prima facie case with likely hood of success and to show that in the absence of the conservatory orders he is likely to suffer prejudice.

(ii)The secondary principal in whether the denial of the conservatory order will enhance the constitutional values and objects of the specific right or freedom in the bill of rights.

(iii)The court should consider whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.

(iv)Whether the public interest would be prejudiced by a decision to exercise discretion to grant or deny conservatory order.”

6. The applicant must show:
 - a. A prima facie case with a likelihood of success;
 - b. Real danger of prejudice if orders are not granted;
 - c. The public interest favours preservation.
7. The rights to fair hearing is entrenched in the Constitution. Article 50(1) of the Constitution provides that:

“Every person has the 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.”
8. The Petitioner alleges that:
 - a. The delineation of catchment areas discriminates against Kakamega County and Malava Sub-County;
 - b. The first schedule was adopted without public participation;
 - c. The delineation departs from the repealed Sugar Act and disadvantages major growers.
 - d. The Respondents and Interested Party contend that:
 - e. The Sugar Bill underwent extensive and documented public participation before the National Assembly and Senate as required by Article 118, evidenced by committee reports listing stakeholder memoranda, consultations, and field visits;
 - f. Zoning is a legislative policy question within the domain of Parliament

- g. The Petitioner has not demonstrated any constitutional criteria for isolating Kakamega County as its own catchment area;
- h. The Board requires representation across all regions, and zoning is meant to curb cane poaching and ensure sustainability;
- i. The matter relates to the legislative process and therefore implicates the separation of powers doctrine.

Analysis

9. At this interlocutory stage, the Court is not required to conclusively determine whether public participation was adequate or whether zoning is discriminatory. However, the Applicant has raised arguable constitutional questions relating to equality under Article 27, participation under Articles 10 & 118, and fair administrative action under Article 47. The case of **Gatirau Munya vs Dickson Mwenda Kithinji & 2 Others (2014) eKLR** held that

“...on the threshold for the granting of conservatory orders. That the applicant is required to demonstrate an arguable case. That under Article 47(1) & (2) of the Constitution. A person who is likely to be affected by administrative action has a reasonable expectation that they will be given a hearing before any adverse action is taken”

10. The Respondents’ evidence of the National Parliament participation is weighty, but whether the specific catchment

delineations were themselves adequately subjected to public participation remains a triable issue.

11. The Court therefore finds that a prima facie case is disclosed.

12. The Petitioner argues that elections conducted under a potentially unconstitutional zoning regime would render the petition nugatory, whereas the respondents and interested party insist that delaying elections will paralyze the board and stall regulation of the sugar industry.

13. However, courts have consistently held that where an impugned administrative or electoral process may interfere with rights or representation, the possibility that the petition could lose its effect is a good reason to keep things preserved in the meantime. Given that once elected, the board's composition cannot easily be undone, the danger is real.

14. Public interest is a decisive factor at this stage. The constitutional integrity of representation is more important than speed. The respondents and the Kenya Sugar Board claim that stopping the elections harms growers, disrupts regulation, and undermines industry stability.

15. The Court accepts that operationalization of the Sugar Act is in the public interest. However, elections conducted under a regime whose constitutional validity is seriously contested risk deeper long-term instability. The case of **Doctors for Life International vs The**

Speaker National Assembly and Others (CCT12/05) (2006) ZACC

11, where the South African Court defined facilitation of public involvement as:

“the phrase facilitate public involvement is a broad concept which relates to the duty to ensure public participation in the law making process...”

16. On matters of involvement of the Parliament in this matter, the Attorney General argues that the Petition challenges legislative actions, and courts must exercise restraint as outlined in **Canada (House of Commons) v Vaid, [2005] 1 SCR 667; 2005 SCC 30**, where the Canadian Supreme Court thus observed, with respect to Parliamentary privileges:

“Within categories of privilege, Parliament is the judge of the occasion and manner of its exercise and such exercise is not reviewable by the courts. A finding that a particular area of parliamentary activity is covered by privilege therefore has very significant legal consequences for Members who claim to be injured by parliamentary conduct.”

17. The Court is satisfied that the petition raises issues partly distinct from Petition E042/2025, particularly on catchment delineation and growers’ representation, which appear specific and not entirely duplicative. The doctrine of separation of powers does not bar the Court from reviewing constitutionality. In the case of **Trusted Society**

of Human Rights Alliance v Attorney General & 2 others; Matemu (Interested Party); Kenya Human Rights Commission & another (Amicus Curiae) (Petition 229 of 2012, the court held that:

“ It is not in doubt that the High Court is the right forum for cases challenging the constitutionality of actions done under the authority of the Constitution. Article 165 of the Constitution provides that 165(3)(d) subject to clause (5), the High Court shall have:

(d) jurisdiction to hear any question respecting the interpretation of this Constitution in the case of...(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.”

Conclusion

18. Having considered the application, the affidavits, submissions, and the law, the Court finds that:
- a. A prima facie case is disclosed;
 - b. There exists real risk of prejudice to the sugar farmers;
 - c. Public interest favours preserving the subject matter;
 - d. The Respondents’ objections raise weighty issues for full hearing but do not defeat interlocutory relief.

Orders

19. A conservatory order is hereby issued restraining the Interested Party (Kenya Sugar Board) from conducting or proceeding with elections of grower representatives under the First Schedule to the Sugar Act, 2024, pending the hearing and determination of this Petition.
20. The Petition shall be heard on a priority basis.
21. Mention 15.1.2026 for directions on the Petition.
22. Right of Appeal 30 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 26TH DAY OF NOVEMBER, 2025.

S.MBUNGI

JUDGE

In the presence of:-

CA: Angong'a

Ms Ogolla for 1st respondent present online.

Mr. Kimeli for interested party.