



**Sang & 5 others v The Board of Management Kenana Sec School & 2 others  
(Petition E001 of 2024) [2024] KEELC 1468 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1468 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**PETITION E001 OF 2024**

**A OMBWAYO, J**

**MARCH 14, 2024**

**IN THE MATTER OF ARTICLES 2 3 10 19 20 21 22 23 27  
40 47 53 258 & 186 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF SECTION 3 4 6 24 25 27 & 36 OF THE NATIONAL  
GOVERNMENT CONSTITUENCIES DEVELOPMENT FUND ACT 2013**

**BETWEEN**

**NELSON CHUMEEKA SANG ..... 1<sup>ST</sup> PETITIONER**  
**DAUDI KITILIT ..... 2<sup>ND</sup> PETITIONER**  
**DAVID KIPROP CHERUTICH ..... 3<sup>RD</sup> PETITIONER**  
**ALICE TARKOK KIPKOECH ..... 4<sup>TH</sup> PETITIONER**  
**FRANCIS SIDLE ..... 5<sup>TH</sup> PETITIONER**  
**JELIMO SAMOBI ..... 6<sup>TH</sup> PETITIONER**

**AND**

**THE BOARD OF MANAGEMENT KENANA SEC SCHOOL . 1<sup>ST</sup> RESPONDENT**  
**NATIONAL GOVERNMENT CONSTITUENCY DEVELOPMENT FUND  
(NGCDF BOARD) ..... 2<sup>ND</sup> RESPONDENT**  
**NATIONAL GOVERNMENT CONSTITUENCY DEVELOPMENT FUND  
(NGCDF COMMITTEE NJORO CONSTITUENCY) ..... 3<sup>RD</sup> RESPONDENT**



## RULING

1. Nelson Chumbeka Sang and 5 others have come to court against the Board of Management Kenana Secondary School and NGCDE by way of petition stating that the petitioners intend to put a stop to the impugned actions concerning the construction of a secondary school known as Kenana Secondary School in Ngongeri settlement scheme. During allocation of land in Ngongeri settlement scheme, the parcel of land known as LR No. Ngongongeri settlement scheme/ 302 was reserved specifically for purposes of construction of a primary school to serve the residents of Kapkein village. The said parcel having been reserved as such, the residents of Kapkein village had legitimate expectations of utilizing the said parcel of land for purpose of constructing a primary school thereon, in the near future.
2. Regrettably, without due public participation and without consulting the residents of Kapkein community, Lawina village, in Molo Constituency, the 1<sup>st</sup> Respondent in connivance with officials of Njoro Constituency CDF began the process of constructing illegal structures on the same land with intent to establish Kenana Secondary school.
3. The Petitioners argue that there was a lack of public participation in the decision-making process leading to the construction of the school, thus violating Article 10(2) of the Constitution and the National Government-Constituency Development Fund Act.
4. There has never been any other public participation to change the initial agreement to build a primary school to building a secondary school by the name Kenana Secondary School. There is dire need to put up a primary school in Lawina village owing to the need of pupils who are faced with challenges while accessing other schools which are far and lack adequate resources.
5. The actions of the Respondents have made it difficult to commence the construction of the school since funds have been allocated towards the construction of the impugned Kenana secondary school while the parcel of land was specifically reserved for the sole purpose of building a Primary school at the time of adjudication and settlement.
6. The residents of Kapkein community, being the primary beneficiaries of the proposed primary school, have a legitimate expectation to participate in the decision-making process regarding the utilization of the parcel of land L.R, No. Ngongongeri settlement scheme/ 302.
7. The lack of public participation denies the Petitioners and the rencerns, and suggestions regarding the construction of the Secondary scidents of Kapkein village the opportunity to voice their opinions, cohool on the said parcel of land.
8. The failure of the Respondent to provide a platform for public participation demonstrates a disregard for the constitutional provisions and principles of governance, as enshrined in Article 10(2) of the Constitution,
9. The Petitioners contend that the actions of the Respondents and/or its employees are malicious, discriminatory and intended to injure and harm the public.
10. The actions of the Respondents constitute violation of the Petitioners' rights and those of residents of Lawina village to equal protection of law, right to own and enjoy use of property in any part of Kenya and right to a fair administrative action.
11. The petitioner prays for a declaration that the actions by the Respondents and/or their employees and servants are unreasonable, unlawful and are in violation of Articles 10, 27, 47, 53 of the Constitution



- of Kenya, 2010. They also pray for a declaration that the actions by the Respondents and/or their employees and servants are unreasonable, unlawful and are in violation of Article 186 & 187 of the Constitution of Kenya, 2010.
12. Moreover, a declaration that the actions by the Respondents and/or their employees and servants are unreasonable, unlawful and are in violation of Section 24 of The National Government Constituencies Development Fund Act,
  13. Furthermore, an order directing the Respondents to initiate a comprehensive public participation process regarding the allocation and utilization of the parcel of land for the construction of the primary school, giving the Petitioner and the residents of Kapkein Community and Lawina Village a meaningful opportunity to participate in the decision-making process.
  14. Lastly, an order of permanent injunction against the Respondents its servants, employees, agents or any person acting on the Respondent's behalf from entering, taking occupation, operating any business thereon, leasing, transferring, and or interfering with the land parcel known as L.R No.Ngongongeri Settlement Scheme/302.
  15. In the supporting affidavit the applicant states that the land was specifically reserved to serve the residents of Kapkein Community and Lawina village and that the residents have the legitimate expectation to utilize it for a primary school and that the structures being constructed on the land are illegal as they are being done without public participation hence violating Articles 10 (2) f the Constitution of Kenya 2010.
  16. In the replying affidavit of Millicent W Gitonga, she states that Kenana primary school is the registered owner of the parcel of land measuring 5.25 hectares after being issued with titles on 16<sup>th</sup> July 1997.
  17. That the primary school decided to establish a secondary school through its parents meetings held at school on 4<sup>th</sup> September 2018 and on 10<sup>th</sup> December 2018.
  19. The sub-county Education director, Njeru was informed and the school was issued with a provisional certificate No.3253000238 by the Ministry of Education through the letter dated 3<sup>rd</sup> February 2021. Full registration was made on 30<sup>th</sup> August 2022 on 9<sup>th</sup> December 2023 and the construction of the school began with 2 classrooms and are nearing completion.
  20. According to the deponent, the issue of land ownership is not under contention as the primary school is the owner and has passed a resolution that the secondary school be constructed on the land.
  21. Accompanying the petition is a notice of motion undated filed on 8<sup>th</sup> February 2024 under certificate of urgency. The petitioner seeks a conservatory order prohibiting the respondent either its servants, employees agents or any person acting on the respondents behalf from entering taking occupation operating any business thereof leasing transferring and or interfering with the land parcel known as LR No. Ngongongeri settlement /302.
  22. The application is made on grounds that the petitioners are the citizens of the Republic of Kenya, residents of Kapkein village which lies in Molo Constituency, Nakuru County and intend to put a stop to the respondents concern from constructing/ completion the construction and enrolling students to the proposed Kenana Secondary school which is being unlawfully constructed on L. R No.Ngongongeri Settlement Scheme/302.
  23. During allocation of land in Ngongongeri settlement scheme, the parcel of land known as LR No. Ngongongeri settlement scheme/ 302 was reserved specifically for purposes of construction of a primary school to serve the residents of Kapkein village.



24. This parcel of land having been reserved as such, the residents of Kapkein village had legitimate expectations of utilizing the said parcel of land for purpose of constructing a primary school thereon, in the near future.
25. The exercise is being done without due public participation and without consulting the residents of Kapkein village which lies in Molo Constituency, the 1<sup>st</sup> Respondent in connivance with officials of Njoro Constituency CDF began the process of constructing illegal structures on the same land with intent establish Kenana Secondary school on the same land.
26. The Petitioners argue that there was a lack of public participation in the decision-making process leading to the construction of the school, thus violating Article 10(2) of the Constitution and the National Government-Constituency Development Fund Act
27. The Petitioners contend that the actions of the Respondents and/ or its employees are malicious, discriminatory and intended to injure and harm the public. The Petitioners argue that they have established a prima facie case and thus the orders sought should be granted.
28. The gravamen of the petitioner’s submissions is that the conservatory order should be given on an inherent merit of a case bearing in mind the public interest and the Constitutional values and the properties magnitude and levels attributable to the relevant cases.
29. The petitioners submit that their case is arguable since it is a matter of great public interest. They were not involved in the decision-making process and therefore the school was in violation of Article 10 (2) of the Constitution. The petitioners argue that there was lack of public participation to consider the building of the secondary school.
30. The petitioners argue that the residents of Kapkein Community being primary beneficiaries of the proposed primary school have a legitimate expectation to participate in the decision making.
31. The petitioners argue that if the conservatory order is not granted the substratum of the case will be rendered nugatory.

In Civil Application No. 5 of 2014 Gatirau Peter Munya -v- Dickson Mwenda Kitbinji & 2 Others (2014) eKLR, the Supreme Court discussed, at paragraph 86, the nature of conservatory orders as follows: -

(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.

32. The Court in Nairobi Civil Appeal 151 of 2011 Invesco Assurance Co. Ltd v MW (Minor suing thro’ next friend and mother (HW)) [2016] eKLR defined a conservatory order as follows: -
  5. A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.



33. In *Judicial Service Commission v Speaker of the National Assembly & Another* [2013] eKLR the Court had the following to say about the nature of conservatory orders:

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.

18. Given the nature of conservatory orders, it is argued, that there is need for a Court to exercise caution when dealing with any request for such prayers. I agree with that proposition for the reason that matters which are the preserve of the main Petition ought not to be dealt with finality at the interlocutory stage.

34. The foregoing was fittingly captured by Ibrahim, J (as he then was) in *Muslim for Human Rights (Milimani) & 2 Others v Attorney General & 2 Others* (2011) eKLR. The Learned Judge, correctly so, stated as follows: -

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

35. This court finds that the applicant has not demonstrated that there was no public participation, I do find that 365 parents of the Kenana primary school were consulted before a decision was taken and therefore there is no evidence that no public participation was done at all. I do find that public interest is not in favour of granting a conservatory order as the buildings have been constructed to the roofing stage. A conservatory order is not the most sufficient to grant now because it will be against public interest. The application is dismissed with no orders as to costs.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 14<sup>TH</sup> DAY OF MARCH 2024.**

**A O OMBWAYO**

**JUDGE**

