



**Trusted Society of Human Rights Alliance v County Executive Committee Member,  
Water, Environment, Energy, Natural Resources and Climate Change, Nakuru County &  
3 others; National Environment Management Authority (Interested Party) (Environment  
& Land Petition E008 of 2024) [2024] KEELC 13450 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13450 (KLR)

**REPUBLIC OF KENYA**

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

**ENVIRONMENT & LAND PETITION E008 OF 2024**

**MAO ODENY, J**

**NOVEMBER 21, 2024**

**IN THE MATTER OF: ARTICLES 1, 2 (1), 3 (1), 10, 19, 20, 21, 22, 23, 35, 42, 47,  
69, 70, 162 (2) B, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS  
UNDER ARTICLES 10 (2) A, 35, 42, 47, 69 AND 70 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: SECTION 13 (2) A (3) (7) OF  
THE ENVIRONMENT AND LAND COURT ACT, 2011.**

**AND**

**IN THE MATTER OF: SECTION 3 OF THE ENVIRONMENTAL  
MANAGEMENT AND CO-ORDINATION ACT.**

**AND**

**IN THE MATTER OF: SECTION 104 AND 105 OF THE COUNTY GOVERNMENTS ACT**

**AND**

**IN THE MATTER OF: RIGHTS TO PROTECTION, CONSERVATION AND  
SUSTAINABLE USE OF CENTRAL PARK-LIONS GARDEN, WITHIN NAKURU CITY.**

**BETWEEN**

**TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE ..... PETITIONER**

**AND**



COUNTY EXECUTIVE COMMITTEE MEMBER, WATER, ENVIRONMENT,  
ENERGY, NATURAL RESOURCES AND CLIMATE CHANGE, NAKURU  
COUNTY ..... 1<sup>ST</sup> RESPONDENT  
CHIEF OFFICER ENVIRONMENT, ENERGY, CLIMATE CHANGE &  
NATURAL RESOURCES NAKURU COUNTY ..... 2<sup>ND</sup> RESPONDENT  
NAKURU COUNTY GOVERNMENT ..... 3<sup>RD</sup> RESPONDENT  
THE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... INTERESTED  
PARTY

### RULING

1. This ruling is in respect of a Notice of Motion dated 30<sup>th</sup> July, 2024 by the Petitioner seeking the following orders:
  - a. Spent
  - b. Spent
  - c. Spent
  - d. That pending the hearing and determination of this Petition a temporary order of injunction and/or Conservatory orders do issue restraining the 1<sup>st</sup> 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents from constructing stalls, kiosks and other commercial structures within Central Park-Lions Garden.
  - e. That the 1<sup>st</sup> 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents be ordered to supply the Petitioner with all information relating to the approval process for the construction of stalls, kiosks and other commercial structures within Central Park- Lions Garden including and not limited to the copies of the, budgetary allocation, submission of detailed architectural plans, environmental impact assessments, public consultation minutes, reports on compliance with zoning regulations, building codes, and any other relevant documents which documents the petitioner intends to rely on in the hearing of this Petition in enforcement of his right to information under Article 35 of *the Constitution* of Kenya.
  - f. That the honourable court do issue an order or give any directions it considers appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment.
  - g. That costs of this application be awarded to the Petitioner in any event.
2. The application was supported by the annexed affidavit of George Narok, the Secretary General of the Petitioner herein who deponed that Lions Garden Park measuring 1.19 acres was closed on 1<sup>st</sup> September 2023 by the 3<sup>rd</sup> Respondent through forceful eviction of several street families and a large tree felled down. He further deponed that the 2<sup>nd</sup> Respondent took over the rehabilitation of the park in November 2023, as a climate change mitigation measure and to enhance the aesthetics of the park.
3. The Petitioner's Secretary General deponed that the rehabilitation project through partnership with Financing Locally Led Climate Action Program (FLLOCA) was launched on 10<sup>th</sup> June, 2024 where



Ksh 10 million was to be used in rehabilitating the 1.19-acre park. It was his deposition that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have embarked on illegal construction of stalls, kiosks and other commercial structures within the confines of the designated Central Park-Lions Garden and their actions are tainted with illegality and an imminent threat to the environment.

4. The 4<sup>th</sup> Respondent filed grounds of opposition dated 16<sup>th</sup> August, 2024 where the Attorney General stated that the Petitioner has failed to demonstrate with reasonable precision how the office has violated their alleged legal rights. The 4<sup>th</sup> Respondent stated that the Petitioner has failed to demonstrate that there exists a cause of action against it and the Petition and Notice of Motion dated 30<sup>th</sup> July, 2024 as against the Attorney General be dismissed with costs.

### **Petitioner's/applicant's Submissions**

5. Counsel for the Petitioner/Applicant, Mr. Oanga, filed submissions dated 30<sup>th</sup> August, 2024 and identified the following issues for determination:
  - a. Whether the petition meets the constitutional threshold set out in Anarita Karimi Njeru Vs Attorney General (No. 1) 1979 1KlR 154?
  - b. Whether the approval process leading to constructing the stalls within Central Park-Lions Garden was vitiated by lack of public participation and consultation as to render it unconstitutional or unlawful?
  - c. Whether the petitioner's prayer for a conservatory order of injunction is merited?
6. On the first issue, counsel submitted that the constitutional provisions denied, violated infringed and/or threatened have not only been properly identified but also the 1<sup>st</sup>-4<sup>th</sup> Respondents response is a direct consequence of the clarity and precision with which the petition was drafted. Counsel stated that paragraph 43 of the Petition gives the details of the Constitutional provisions infringed/violated and expounds on Articles 10(2) a,35,42,47,69 and 70.
7. According to counsel, the construction of stalls, kiosks, and other commercial structures within the confines of the designated Central Park Lions Garden poses a threat to the delicate ecological balance of the surrounding environment which will result in environmental degradation through increased waste generation, pollution and habitat destruction.
8. On the second issue whether the approval process leading to the construction of the stalls within the Park was vitiated by lack of public participation and consultation, Mr. Oanga relied on Article 10 and 69 of *the Constitution* of Kenya and Principle 10 of the Rio Declaration on Environment and Development and submitted that the notice inviting members of the public to the public participation was issued on 9<sup>th</sup> August, 2023 and four days later on 14<sup>th</sup> August, 2023 the public participation was held and six days later, a notice closing the park for rehabilitation was issued. It was counsel's submission that the four days' notice was not a reasonable notice and thus various stakeholders were denied a reasonable opportunity to air their views.
9. Counsel further submitted that from the list of stakeholders presented in the 1<sup>st</sup>-3<sup>rd</sup> Respondent's Replying Affidavit, all the participants were in one way or other business people operating within the park and thus the question is whether the views of other members of the public were taken into account. Counsel relied on the cases of British American Tobacco Kenya, PLC versus Cabinet Secretary for the Ministry of Health & 3 others and Mohamed Ali Baadi and others vs Attorney General & 11 others [2018] eKLR and submitted that the public participation fell below the guidelines set by the supreme court, the notice issued was not reasonable and the process was not inclusive.



10. Mr. Oanga also cited the provisions of Article 10 of *the Constitution* which obliges every State Organ, State Officer or Public officer to facilitate a consultative process with the public in the State Organs or State officer's processes, application of any law, public policy or decision making. Similarly, Article 69 of *the Constitution* imposes a parallel obligation on the State to encourage public participation in the management, protection and conservation of the environment.
11. On the international level, counsel relied on Principle 10 of the Rio Declaration on Environment and Development, which provides that States shall facilitate and encourage public awareness and participation by making information widely available. Additionally, Principle 22 provides for the effective participation of indigenous communities and other local communities in the achievement of sustainable development.
12. On the third issue, counsel relied on the cases of *Giella vs Cassman Brown & Co Ltd (1973) E.A 358*, *Kevin K. Mwitwa & Others vs Kenya School of Law & Others* and *National Environment Management Authority & another vs KM (Minor suing through Mother and Best friend SKS) & 17 others* and submitted that the petitioner has sufficiently established a prima facie case for grant of the conservatory orders sought.
13. Counsel relied on the case of *Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) eKLR* and submitted that there is a danger that the public will suffer irreparable harm which is imminent and evident and which danger deserves immediate redress by the Court by granting a conservatory order of injunction. Mr. Oanga further submitted that the balance of convenience tilts in favour of this court granting the conservatory injunctive order sought as the Petitioner has advanced substantive reasons to warrant granting the prayers sought.

#### **1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Submissions**

14. Ms. Litunda, counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed submissions dated 7<sup>th</sup> October, 2024 and identified the issue for determination as whether the petitioner/applicant is entitled to an order of temporary injunction as prayed.
15. Counsel submitted that the application dated 30<sup>th</sup> July, 2024 has not met the threshold set in the case of *Giella vs Cassman Brown & Co Ltd (1973) EA 358* as it failed to demonstrate that the Respondents have in any way acted illegally, unprocedurally or irregularly. Counsel relied on the cases of *Margaret Njoki Migwi vs Barclays Bank of Kenya Ltd (2016) eKLR*, *American Cynamid vs Ethicon Limited (1975) AC 396* and *Kenleb Cons Ltd vs New Gatitu Sertvice Station Ltd & another (1990) eKLR* and submitted that the petitioner must make full candid disclosure of all material facts in order to benefit from the equitable relief of an injunction.
16. Ms. Litunda submitted that adequate public participation was conducted in the project whereby the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents received a proposal by members of the community through Biashara Ward Climate Change Planning Committee for seeking the rehabilitation of the park to create a more conducive environment for the members of the public. Counsel submitted that the County Government is mandated under *the Constitution* to oversee issues relating to County parks, thus the rehabilitation of the park was necessitated by the fact that the park had become an eyesore, a den of criminals and an open defecation area.
17. According to counsel, the respondent invited stakeholders for a consultative meeting, which took place on 14<sup>th</sup> August 2023 where the respondent received divergent views on the rehabilitation of the park. That a 14-day notice was issued and subsequently the trees were felled down and the park closed for



rehabilitation. It was counsel's submission that there was adequate public participation and therefore the 3<sup>rd</sup> Respondent acted lawfully.

18. Counsel relied on Section 27 (1) of the *Civil Procedure Act*, 2010 and the case of Feisal Hassan & 2 others vs Public Service Board of Marsabit County & another [2016] eKLR and submitted that this is a public litigation case and thus the law clearly speaks and pronounces itself that in cases where a matter is brought to Court in the public's interest that the litigant shall not be required to pay costs.

### **Analysis And Determination**

19. The issues that arise for determination are:
- a. Whether the petition meets the threshold of petitions as per Anarita Karimi case.
  - b. Whether this court should issue a temporary order of injunction and/or Conservatory orders restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents from constructing stalls, kiosks and other commercial structures within Central Park-Lions Garden.
  - c. Whether the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents should be ordered to supply the Petitioner with all information relating to the approval process for the construction of stalls, kiosks and other commercial structures within Central Park- Lions Garden.
  - d. Who should bear the costs of the application?
20. Since the promulgation of *the Constitution* of Kenya 2010, there have been many cases in respect of public participation. Article 10 (2) a of *the Constitution* outlines participation of the public as one of the national values and principles of governance which bind all state organs and public officers. Similarly, Article 69(1) (d) of *the Constitution* on the other hand provides that:
- “...the State shall encourage public participation in the management, protection and conservation of the environment.”
21. This petition is hinged on public participation, access to information and participation in the management, protection and conservation of the environment, which have been particularized in the petition. Since the 4<sup>th</sup> Respondent raised an issue that the petition does not meet the threshold set out in the case of Anarita Karimi Njeru V Republic [1979]1 eKLR, it is important to first deal with the issue before we move to the issue whether the petitioners are entitled to conservatory orders.
22. Rule 4(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the “Mutunga Rules”) provides that:
- :“Where any right or fundamental freedom provided for in *the Constitution* is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.”
23. Rule 10 of the Mutunga Rules governs the form that a constitution should take. Rule 10(2) of the same Rules specifically provide as follows:

- “(2) The petition shall disclose the following—
- (a) the petitioner's name and address;
  - (b) the facts relied upon;
  - (c) the constitutional provision violated;



- (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
- (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
- (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and
- (g) the relief sought by the petitioner.”

24. I have perused the petition and find that the Petitioner has listed with precision and particularity the Articles of *the Constitution* that they allege to have been violated by the respondents hence it meets the constitutional threshold for petitions.

25. On the issue whether the court should grant conservatory orders against the Respondents, the Supreme Court in *Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others* [2014] eKLR discussed 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.”

26. In the case of *Invesco Assurance Co. Ltd vs. MW (Minor suing thro' next friend and mother (HW))* [2016] eKLR the court defined a conservatory order as follows:

“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.”

27. The duty of the court at this stage is not to make final orders but to ensure that the substratum of the case is preserved if a party applying for such orders proves the same as was held in the case of *Muslim for Human Rights (Milimani) & 2 Others vs Attorney General & 2 Others* [2011] eKLR 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.”



28. Similarly, in the case of Centre for Rights Education & Awareness (CREAW) v Attorney General & another [2015] eKLR it was held:

“ At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with 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*.”

29. The Petitioner claims that the construction of the stalls and kiosks in a designated park is a threat to the delicate ecological balance of the surrounding environment which will result in environmental degradation through pollution, increased waste generation and habitat destruction. The Respondent has admitted that they felled down the trees and closed the park for rehabilitation and that the construction of the stall is to improve the aesthetics of the Park.

30. In the case of Damour Florian Emmeric v Director of Immigration Services [2022] eKLR a prima facie case was defined as follows:

“ 56. . In sum, therefore, in determining whether a matter discloses a prima-facie case, a Court must look at the case as a whole. It must weigh, albeit preliminarily, the pleadings, the factual basis, the respective parties’ positions, the remedies sought and the law. In so doing, a Constitutional Court must be guided by Articles 22 (1) and 258(1) of *the Constitution* which provisions are on the right to institute Court proceedings whenever a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened or the when *the Constitution* has been contravened, or is threatened with contravention.”

31. This is a case involving possible degradation of the environment and more specifically a public park which is used by citizens hence their views and participation is paramount. The Respondent submitted that they held a stakeholder meeting on 14<sup>th</sup> August 2023 and thereafter the Park was closed and that a 14 day notice was issued. The court will not at this stage determine whether that amounted to meaningful participation, or whether it was a mere formality for purposes of fulfilling constitutional requirement as per Article 10. The court is concerned with the preservation of the substratum of the case so as not to render the petition an academic exercise.

32. I find that the Petitioner has proved a prima facie case for a conservatory order to be granted by this court. The other issues for supply of information relating to approval process for construction of the stalls, kiosks and other commercial structures within the Central Park Lions Garden will be dealt with during the hearing of the petition where directions can be given for such access.

33. I have considered the application, the responses, the submissions by counsel and the relevant judicial authorities and therefore grant conservatory orders for a period of 60 days with no orders as to costs this being a public interest litigation. Parties to fast track the hearing of this Petition.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 21<sup>ST</sup> DAY OF NOVEMBER 2024.**

**M. A. ODENY**

**JUDGE**

