Kibagendi & 3 others v Commission for University Education & 7 others (Petition E009 of 2024) [2025] KEHC 4578 (KLR) (27 March 2025) (Ruling)

Neutral citation: [2025] KEHC 4578 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

PETITION E009 OF 2024

WA OKWANY, J

MARCH 27, 2025

BETWEEN

RICHARD KIBAGENDI ..... 1ST PETITIONER

NEMWEL NYANDIKA ..... 2ND PETITIONER

JOSEPH NYAMWARO ..... 3RD PETITIONER

NELSON MAGETO ..... 4TH PETITIONER

AND

THE COMMISSION FOR UNIVERSITY EDUCATION ..... 1ST RESPONDENT

CABINET SECRETARY MINISTRY OF EDUCATION ..... 2ND RESPONDENT

NYAMIRA COUNTY GOVERNMENT ..... 3RD RESPONDENT

KISII UNIVERSITY ..... 4TH RESPONDENT

UNIVERSITY OF ELDORET ..... 5TH RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION ..... 6TH RESPONDENT

ATTORNEY GENERAL ..... 7TH RESPONDENT

HON JOASH NYAMOKO ..... 8TH RESPONDENT

RULING

1. The Petitioners/Applicants filed the Petition dated 14th October 2024 seeking, inter alia, a declaration that the communication made by the President on 12th August 2024 declaring Kiabonyoru as the seat for the proposed Nyamira University is null and void as the President of the Republic of Kenya, H.E. Dr. William Samoei Arap Ruto, lacked the capacity to make the declaration.

2. Concurrently with the Petition, the Applicants filed the Application dated 14th October 2024 seeking the following orders: -

    1. Spent

    2. Spent

    3. Pending the hearing and determination of the instant Petition, the honourable court be pleased to issue an order of temporary injunction restraining the Respondents herein from approving Kiabonyoru as the location for the seat of the proposed Nyamira University.

    4. Spent

    5. Pending the hearing and determination of the Petition, a conservatory order be and is hereby issued staying the implementation of the president's declaration made on 12th August 2024 regarding the establishment of Nyamira University at Kiabonyoru.

    6. Costs of this Application be provided for/in any event be borne by the Respondents.

    7. Such further and/or orders be borne by the Respondents.

3. The Application is supported by the 1st Applicant's affidavit and is premised on the following: -

    a. That the presidential declaration made on 12th August 2024 designated Kiabonyoru as the site for the proposed Nyamira University yet it had already been previously earmarked for the construction of Eldoret University's constituent college.

    b. That such a designation would amount to an unequal distribution of county resources since all the sub-counties other than Manga sub-county had received substantial development.

    c. That public participation had already been conducted where it was unanimously agreed that the leadership of the 3rd Respondent should consider locating Nyamira University in Manga and that the decision to designate Kiabonyoru ward was questionable and excluded the people of Nyamira County and their elected representatives which had the potential of disenfranchising the people of Manga sub-county and denying them their right to equitable distribution of county resources.

4. The 1st, 2nd and 7th Respondents filed grounds of objection dated 14th November 2024 in which they listed the following grounds: -

    1. That the Application has not met the requisite threshold for the grant of conservatory orders as set out in the case of Gatirau Peter Munya v Dickson Mwenda Kithinjl & 2 others (2014) eKLR.

    2. That the injunctive orders sought in the Application contravene the mandatory provisions of Order 29, rule 2 (2) (d) of the Civil Procedure Rules, 2010 as read together with section 16 (2) of the *Government Proceedings Act* (Cap. 40 Laws of Kenya).

    3. That the substratum of the Application and the Petition is on the physical location of the proposed public university which is a dispute relating to land use planning within the jurisdiction of the Environment and Land Court.

    4. That this Honourable Court is devoid of jurisdiction to entertain the Application and the Petition by virtue of the express provisions of Article 162

    5.

(2) (b) of *the Constitution* as read together with section 13 of the *Environment and Land Court Act*.

6. That the issuance of the orders sought in the Application is tantamount to interfering with the Constitutional functions of the National Government as provided in the Fourth Schedule of *the Constitution* of Kenya.

7. That the establishment of the proposed public university is in the interest of the general public which overrides the individual interests of the Applicants.

8. That the Application is not supported by factual evidence and/or the Law.

9. That the Application is premature, lacks merit and amounts to a complete abuse of the Court process.

5. The 3rd Respondent also opposed the Application on the grounds that it is inadmissible for lack of jurisdiction, is premature, lacks constitutional basis, does not meet the threshold for grant of conservatory orders, the orders sought amount to interference with the Constitutional functions of the National Government as provided in the Fourth Schedule of *the Constitution* of Kenya and that the reliefs sought are contrary to public interest as the establishment of the proposed public university is in the interest of the general public which overrides the individual interests of the Applicants.

6. The 5th Respondent similarly opposed the Application on the same grounds and added that the Application is incompetent. superfluous, deficient and legally untenable.

7. The instant notice of motion is devoid of merits and it should be dismissed with costs.

8. The Application was canvassed by way of written submissions which I have considered.

The Applicants' Submissions

9. The Applicants submitted that Article 165 (3) of *the Constitution* grants this court has the jurisdiction to entertain the Application and Petition. It was submitted that the Petition does not fall under the provisions of Section 13 of the Environment and Lands Court Act, since it merely challenges the president's proclamation on the establishment of the proposed university at Kiabonyoru ward.

10. It was submitted by Counsel that the Application is premised on Order 40 Rule 1 of the Civil Procedure Rules which allows the court to grant orders of temporary injunction to preserve a suit property pending the disposal of the suit. It was the Applicants' case that the Application meets the conditions set out for the granting interlocutory injunctive orders as outlined by the Court of Appeal in Nguruman Limited vs. Jan Bonde Nielsen & 2 Others C.A. No. 77 of 2012 (2014) eKLR. Counsel submitted that the Respondents present any material to show that the impugned declaration is legitimate so as to so to allow its implementation as communicated. The Applicants maintained that the balance of convenience tilts in their favour.

The Respondents' Submissions

11. The 3rd Respondent submitted that the Petition was legally flawed, premature and an abuse of the court process and ought to be dismissed. The Respondent isolated the main issues for determination to be as follows: -

a. Whether the court has the jurisdiction to entertain the Petition.

b. Whether the application has a constitutional basis.

c. Whether the Application meets the threshold for the granting of conservatory orders.

12. On jurisdiction, it was submitted that the 4th Schedule of *the Constitution* at part 1, paragraph *para_15 15* provides that the establishment, planning and approval of educations institutions was the preserve of the National government discharged through agencies such as the 1st Respondent herein. It was the Respondents' case that the matters raised in the Petition related to the establishment of Nyamira University which was a public institution of higher learning, thus falling exclusively under the mandate of the National government that is carried out exercised by the Commission for University Education.

13. The Respondents urged the Court to exercise judicial restraint on matters that fall within the domain of other arms of government as was stated in the case of Samuel Kamau Macharia & Another vs. KCB Ltd. and 2 Others (2012) eKLR where the Supreme Court held that a court cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.

14. It was submitted that the issues raised in the Petition could be addressed by the 1st Respondent since the *Universities Act* 2012 empowers it to regulate the establishment, accreditation and governance of universities.

15. On whether the Petition has a constitutional basis, it was submitted that the Applicants did not demonstrate any infringement of their constitutional rights as required under Article 23 of *the Constitution* and as was stated in the cases of Anarita Karimi Njeri vs. Republic (1979) eKLR and Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR wherein it was held that claims of violation of constitutional rights must be pleaded with a high degree of particularity and reasonable precision and must set out the constitutional provisions have been infringed and the manner of infringement.

16. It was submitted that the present Application was fatally defective as it lacks a constitutional basis since the allegations made by the Applicants are based on speculation which cannot form the basis for judicial intervention. Reference was made to the decision in Trusted Society of Human Rights Alliance vs. The Attorney General & Others (2012) eKLR.

17. Reliance was also placed in the decision in Kenya Small Scale Farmers Forum vs. Cabinet Secretary Ministry of Education, High Court Petition No. 399 of [2015] eKLR, Gatirau Peter Munya vs. Dickson Mwenda Githinji & 2 Others (2014) eKLR and Centre for Rights Education and Awareness (CREAW) and 7 Others vs. AG (2011) eKLR where the principles governing the granting conservatory orders were established.

18. It was Counsel submitted that the Applicants did not demonstrate how any of their constitutional rights would be violated and that their opposition to the location of Nyamira County University was merely speculative based on generalized concerns about potential community impacts without any tangible evidence of harm or violation of rights.

19. It was further submitted that the balance of convenience tilts in favour of the Respondents since the development of the university is a public interest matter and that stopping such a project would be detrimental to the broader community.

20. The 4th Respondent submitted that the Application is incompetent and devoid of merits because the Applicants have not presented any evidence to support the granting of the orders sought such as a written directive, from the president, to confirm that he had directed the establishment of a university at Kiabonyoru. Reference was made to the case of Kyalo Elly Joy vs. Samuel Gitahi Kanyeri High Court Civil Appeal No. 102 of 2018 for the assertion that he who alleges must prove.

Analysis and Determination

21. I have carefully considered the pleadings filed herein and the parties' respective submissions. I find that the main issue for determination is whether this court has the jurisdiction to entertain the Application and whether the Applicants have made out a case for the granting of the orders of temporary injunction.

Jurisdiction

22. Jurisdiction refers to the authority of a Court to hear and determine disputes litigated before it. John Beecroft Saunders in Words and Phrases Legally Defined Vol. 3, defines jurisdiction as follows:-

> " By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

23. It is trite that jurisdiction is derived either from *the Constitution* or statute. This Court's jurisdiction is captured under Article 165 of *the Constitution* which stipulates as follows: -

> 165. High Court
>
> 3. Subject to clause (5), the High Court shall have—
>
> a. unlimited original jurisdiction in criminal and civil matters;
>
> b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
>
> c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
>
> d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
>
> i. the question whether any law is inconsistent with or in contravention of this Constitution;
>
> 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;
>
> iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
>
> iv. a question relating to conflict of laws under Article 191; and

e. any other jurisdiction, original or appellate, conferred on it by legislation.

24. A cursory look at the Petition reveals that it is mainly founded on alleged violation of several Articles of *the Constitution*. The 1st, 2nd and 7th Respondents maintained that the instant petition falls within the purview of Article 162 (2) (b) of *the Constitution* as read together with Section 13 of the *Environment and Land Court Act*. Without delving into the merits of the Petition, at this interlocutory stage of the proceedings, I am unable to find that it is concerned with a land matter so as to bring it within the jurisdiction of the Environment and Land Court as the Respondents appeared to suggest.

25. I find that by virtue of the provisions of Article 165 of *the Constitution*, this court is clothed with the requisite jurisdiction to entertain the Petition and, by extension, the Application.

Injunction

26. The principles governing the granting of orders of temporary injunction were well settled in the case of Giella vs. Cassman Brown (1973) EA 358 and reiterated in numerous decisions particularly in the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 others *CA No.77 of 2012* (2014) eKLR where the Court of Appeal held that;

> "in an interlocutory injunction application the Applicant has to satisfy the triple requirements to
>
> a. establishes his case only at a prima facie level,
>
> b. demonstrates irreparable injury if a temporary injunction is not granted and
>
> c. allay any doubts as to b, by showing that the balance of convenience is in his favour.
>
> These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially".

27. In Mrao Ltd vs. First American Bank of Kenya Ltd (2003) eKLR the Court of Appeal held as follows on what constitutes a prima facie case: -

> "... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

28. The Applicants were also required to demonstrate that they will suffer irreparable loss unless the orders of injunction sought are granted. Irreparable loss was explained in the case of Pius Kipchirchir Kogo vs. Frank Kimeli Tenai (2018) eKLR as follows: -

> "Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

29. Lastly, the Applicants were also required to demonstrate that the balance of convenience tilts in their favour. In the case of Pius Kipchirchir Kogo vs. Frank Kimeli Tenai (supra) the concept of balance of convenience was defined as follows: -

> " The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.
>
> In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

30. In the case of Paul Gitonga Wanjau vs. Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR, the court also dealt with the issue of balance of convenience and expressed itself thus: -

> " Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."

31. In Robert Mugo Wa Karanja vs. Ecobank (Kenya) Limited & Another [2019) eKLR the court held as follows when determining an injunction application: -

> " circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts..."

32. Guided by the above cited cases and applying the principles governing the granting of orders of injunction to the present case, I will turn to consider if this application meets the threshold set for the granting of orders of injunction.

33. The Applicant's case is anchored on an alleged declaration made by the President on 12th August 2024 regarding the establishment of Nyamira University at Kiabonyoru Ward. The Applicants did not however demonstrate that the alleged declaration had been actualised through some tangible or precipitate action taken by the President or the Respondents herein in order to satisfy this court that they have a legal right which has been threatened with infringement by the Respondents so as to

warrant their explanation or rebuttal. I am of the humble view that the said declaration may have been a mere suggestion or proposal that is yet to materialise so as to confer any right, benefit or loss on any of the parties.

34. This court is also aware that the establishment of a university anywhere in Kenya is a regulated process governed by the Commission for University Education (CUE) under the *Universities Act*, 2012. The procedure typically involves several stages which include application, evaluation and accreditation. In this regard, this court finds it hard to believe that a university can be established through a Presidential declaration or decree without going through the stages that I have highlighted herein.

Conservatory Orders

35. The principles governing grant of conservatory orders in Kenya were settled by the Supreme Court in Civil Application No 5 of 2014 Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others where the court discussed the nature of conservatory orders as follows: -

> " 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."

36. Conservatory orders are, therefore, aimed at preserving the substratum of the matter pending the determination of the main issues in dispute. Considering the interlocutory nature of conservatory orders courts have taken the position that they need to exercise caution when dealing with any request for such prayers bearing in mind the fact that matters which are the preserve of the main petition ought not to be dealt with finality at the interlocutory stage. (See the case of Centre for Rights Education and Awareness (CREAW) & 7 others vs. Attorney General (2011) eKLR).

37. In Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board & others Nairobi High Court Constitutional Petition No 154 of 2016 (2016) eKLR the court summarized three main conditions to be fulfilled for the granting of conservatory orders as follows: -

    i. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.

    ii. Whether, if a conservatory order is not granted, the petition alleging violation of, or threat of violation of rights will be rendered nugatory; and

    iii. The public interest must be considered before grant of a conservatory order.

38. As I have already noted in this ruling, the Applicants did not demonstrate that they have a prima facie case with a likelihood of success or that in the absence of the conservatory orders, and orders of injunction, they are likely to suffer prejudice.

39. My finding on the aspect of prima facie case would have been sufficient to determine this application, but I am still minded to consider if the other conditions for the granting of orders of injunction have been established.

40. Turning to the second limb of irreparable loss, I find that the Applicants have not demonstrated the individual loss, material or otherwise, that they stand to suffer if the University, if any, is located at Kiabonyoru Ward as opposed to any other location.

41. Lastly, on balance of convenience, I am unable to find in favour of the Applicants whose claim, I have already found, is merely based on a proposal that is yet to be put into action through any known process for the establishment of a university.

42. For the reasons stated in this ruling, I find that the application dated 14th October 2024 is not merited and I therefore dismiss with orders that costs shall abide the outcome of the main Petition.

43. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 27 TH DAY OF MARCH 2025.

W. A. OKWANY

JUDGE