



REPUBLIC OF KENYA



**Omar v State Department of Housing & Urban Development & another  
(Petition E004 of 2025) [2025] KEHC 11500 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11500 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
PETITION E004 OF 2025**

**JN ONYIEGO, J  
JULY 31, 2025**

**BETWEEN**

**ABDISALAN ADAN OMAR ..... PETITIONER**

**AND**

**STATE DEPARTMENT OF HOUSING & URBAN DEVELOPMENT .... 1<sup>ST</sup>  
RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant/petitioner moved this court via a petition dated 18.02. 2025 seeking orders that:
  - a. A declaration be issued under articles 10(1)(c), (2)(b)(1) and (2),27,47 & 232(1)(d), that the respondents are under duty to let the project be implemented in Buna as earlier advertised and intended.
  - b. A declaration be issued that the respondents have failed to have regard to equality, equity and fairness to the people from Buna.
  - c. A declaration be issued that the decision to change location of the project from Buna to Korondille is null and void ab initio and ought to be reversed so as to pave way for the implementation of the project.
  - d. An order do issue to remove to this court and quash the respondent's decision to change the location of the project from Buna to Korondille.
  - e. A permanent mandatory order do issue directing the 1<sup>st</sup> respondent to carry out the project in Buna.
  - f. The cost of this petition be borne jointly and severally by the respondents.





8. Similarly, the respondent through Mr. Charles M. Hinga, the principal secretary in charge of the State Department for Housing and Urban Development at the Ministry of Lands swore a replying affidavit on 12.03.2025 deposing that it was the member of parliament for Wajir North Constituency who wrote to the 1<sup>st</sup> respondent requesting that the proposed Buna Economic Stimulus Project Market hereinafter, ESP market be moved to Korondille Sub County. That the rationale behind the member of parliament's request was that Buna Town has an existing market that is under-utilized and that the town is also set to benefit from the Affordable Housing Programme (A.H.P) of 400 units.
9. It was averred that Korondille and Wajir North sub counties had no project at all and sought the intervention of the regional design team to issue an addendum to relocate the proposed ESP from Buna to Korondille as the adjustment was crucial to ensuring and aligning projects with the current regional needs. It was further averred that the State Department in considering the request noted that there was need to balance developments in Wajir North Constituency as expressed by the local leadership. It was stated that Buna and Korondille are two of the seven wards that form Wajir North Constituency and as such, developments of the ESP market in Korondille is still for the betterment of the lives of the people of Wajir North Constituency.
10. Additionally, that the suit herein as filed ought not be entertained by this court for the reason that this Honourable Court lacks requisite jurisdiction to handle the matter. That the court under article 162(2)(b) is the proper court where the suit ought to be filed. Further, that the petitioner did not demonstrate any allegations of corruption, impunity and arbitrariness of the decision to transfer the market from Buna to Korondille.
11. The application was canvassed by way of written submissions.
12. The applicant filed submissions dated 30.05.2025 urging that the rights and fundamental freedoms of the people of Buna have been infringed and violated by the blatant breach of express provisions of articles 10(1)(c), (2)(b)(1) & (2), 27, 47 and 232(1)(d) of the constitution in purporting to change the market location from Buna to Kolondile. That at least, the people of Buna ought to have been engaged by the 1<sup>st</sup> respondent before changing the location of the market. The applicant relied on the case of Suchan Investment Limited vs Ministry of National Heritage & Culture & 3 Others [2016] eKLR, where the court highlighted that articles 47(1) & (2) of the constitution provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
13. It was urged that article 232 of the constitution integrates the involvement of people in the process of policy making as a key value and principle of public service. That the people of Buna were not involved in any way in the decision to change the location of construction of the market place from Buna to Kolondile. To that end, the petitioner urged that noting that the 1<sup>st</sup> respondent unilaterally made a decision to change the location of construction of a market place, the same ought to be rendered null.
14. The respondent filed submissions dated 19.06.2025 contending that the allegation of want of public participation is without basis and is premature on account of open tenders in light of section 91 of the Public Procurement and Asset Disposal Act as clarified by the Court of Appeal in the case of Independent Electoral and Boundaries 2 Commission vs National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR. That the issue in change of the location of the said proposed Buna ESP market is an issue that the respondents considered as being a fair action to bring equity to other persons other than the Buna residents who also have the affordable housing project being carried out in their area. This court was thus urged to dismiss the application herein for want of merit.



15. I have considered the application herein, the reply thereof and submissions by both parties. The only issue for determination is whether the applicants have met the threshold for grant of conservatory orders.
16. A conservatory order is in its very nature, a temporary relief issued by a court of law to stop a certain act from happening or continuing to happen pending issuance of a substantive order or declaration. In the case of *Invesco Assurance Co. Ltd vs MW (minor suing thro'next friend and mother (HW))* (2016) eKLR, the court held 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”.
- [Also see the Supreme Court in the case of *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others*].
17. The applicant thus ought to have demonstrated that he has an arguable prima facie case with a likelihood of success and that in the absence of the conservatory order, he is likely to suffer prejudice. See the case of *Wilson Kaberia Nkunja vs The Magistrate and Judges Vetting Board and others* Nairobi High Court Constitutional Petition No. 154 of 2016.
18. The second principle is whether the grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights. Thirdly, is the question whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether, to grant or deny a conservatory order. [See *County Assembly of Machakos vs Governor, Machakos County & 4 others* [2018] eKLR.
19. It is trite that when a court is called upon to determine whether a prima facie case has been established, it should not delve into a detailed analysis of the facts and law but should restrain itself to the fact whether an applicant has put forward a case that is arguable hence not frivolous. In *Board of Management of Uhuru Secondary School vs City County Director of Education & 2 others* Petition No. 359 of 2015, the Court stated that:
- “26. It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evidence of a likelihood of success. The prima facie case ought to be beyond a speculative basis...”
20. The applicants are seeking a conservatory order restraining the 1<sup>st</sup> respondent from changing the location of construction of the market place from Buna to Kolondile. They urged that the same was carried out unilaterally by the 1<sup>st</sup> respondent without involving the Buna people. The same was not rebutted and to the contrary, the 1<sup>st</sup> respondent urged that the move was considered as being fair so as to bring equity to other persons other than the Buna residents who also have the affordable housing project being carried out in their area. In my view, the applicant thus established a prima facie case which is arguable.
21. As regards the question of public interest, one would have to examine the importance of having a market constructed in a particular area. Among the benefits realizable is job creation distribution and increased social-economic resources. It was urged that the people of Buna had already taken proactive steps towards the realization of the said market hence in my view, the same was a matter of public



interest. In the case of *Kenya Ant-Corruption Commission vs Deepak Chamanlal kamani and 4 others* (2014) e KLR the court held that;

“...a public interest must be a matter in which the whole society has a stake, anything affecting the legal rights or liability of the public at large”

22. The applicant also urged that the 1<sup>st</sup> respondent had breached the provisions of articles 10(1)(c), (2)(b) (1) & (2), 27, 47 and 232(1)(d) in respect to public participation by purporting to change the market location from Buna to Kolondile. To that end, it was argued that it was necessary that this court uphold such rights by allowing the prayers herein. [ See *Law Society of Kenya v Officer of the Attorney General & another; Judicial Service Commission (Interested Party)* [2020] eKLR].
23. Amongst the reliefs sought is a declaration that there was lack of public participation in the creation and the relocation of the market from Buna to Kolondile. This is an important aspect which cannot be ignored.
24. In the circumstances, it is my finding that the petition herein is likely to be rendered nugatory if the conservatory order is not granted. In the same breadth, no prejudice is likely to be suffered by the respondents if the application is not allowed. As such, it is my view that the threshold for grant of a conservatory order sought pending the hearing and determination of the petition has been met by the applicant.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31<sup>ST</sup> DAY OF JULY 2025**

.....

**J. N. ONYIEGO**

**JUDGE**

