



Mursal & another v Ministry of Interior & Coordination of National Government & 3 others (Petition E022 of 2023) [2024] KEHC 4527 (KLR) (28 March 2024) (Ruling)

Neutral citation: [2024] KEHC 4527 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
PETITION E022 OF 2023
JN ONYIEGO, J
MARCH 28, 2024**

BETWEEN

ISSACK MOHAMED MURSAL 1ST PETITIONER

HUSSEIN SULTAN FARAH 2ND PETITIONER

AND

**MINISTRY OF INTERIOR & COORDINATION OF NATIONAL
GOVERNMENT 1ST RESPONDENT**

COUNTY COMMISSIONER, GARISSA COUNTY 2ND RESPONDENT

**DEPUTY COUNTY COMMISSIONER, GARISSA TOWNSHIP 3RD
RESPONDENT**

THE ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. The applicants herein via a notice of motion application dated 19.12.23 moved to this court pursuant to Articles 3,10,22,23,35,47, 165,and 258(1) of the Constitution seeking;
 - i. Spent.
 - ii. That this Honourable Court be pleased to issue a conservatory order prohibiting the respondents from launching Sankuri Sub County and its proposed headquarters pending the hearing and determination of this application.
 - iii. That this Honourable Court be pleased to issue a conservatory order prohibiting the respondents from launching Sankuri Sub County and its proposed headquarters pending the hearing and determination of this petition.



- iv. That this Honourable Court be pleased to issue a conservatory order prohibiting the respondents from establishing Shimbirey or any other administrative unit as the Sankuri Sub County headquarters pending the hearing and determination of this application.
 - v. That this Honourable Court be pleased to issue a conservatory order prohibiting the respondents from establishing Shimbirey or any other administrative unit as the Sankuri Sub County headquarters pending the hearing and determination of this petition.
 - vi. Costs of the application.
2. When the matter came up before Justice murithi the duty judge, then he certified the matter urgent but fell short of granting exparte orders. For some reason, the applicants filed a similar application dated 31st January 2024 seeking similar orders. The court directed for service of the two applications and gave interpartes hearing on 29th February 2024.
 3. The two applications are anchored on grounds set out on the face of it and affidavits sworn by the 1st applicant. The applicants' case is based on the facts that on 25.01.2021, a meeting of Saka and Sankuri Divisions was held at the Sankuri Assistant County Commissioner's office. That among issues discussed at the meeting was a proposal to merge Saka and Sankuri divisions to create a new sub – county called Sankuri whose headquarters would be at Balambala (Fatuma Golicha Center). It was deposed that following the said joint security meeting's proposal, the then cabinet secretary for the Ministry of Interior and Coordination of National Government gazetted Sankuri division as a sub county via a gazette notice dated 17.03.2022.
 4. That the same was to be launched but due to the heavy rains experienced in the whole country, the proposed launch of the sub counties did not proceed as scheduled. He averred that the creation of the sub county and the establishment of its headquarters are germane issues that have serious ramifications on the residents of the sub county and that it was important to consult and collect the views of the residents of the sub county before the creation of the sub county and the establishment of the location of its headquarters. That in the present circumstances, no public participation was carried out by the respondents before the creation of Sankuri Sub County and the establishment of its headquarters at Shimbirey location.
 5. It was deposed that the residents of Saka division had expressed their concerns and dissatisfaction in the establishment of county headquarters at Shimbirey through a public petition addressed to the cabinet secretary for the 1st respondent and to the offices of the other respondents. That a fair and just establishment of a sub county and the location of its headquarters ought to consider amongst other things; the population of the location; the social amenitie; its administrative boundaries; whether the sub county is strategically located in order to make it easily accessible to all residents of the sub county and; the interest of ethnic minorities, youth, women and persons living with disabilities. That the establishment of the sub county and the location of its headquarters should not therefore prejudice or marginalize a particular ethnic group or class of people.
 6. The court directed that the applications be canvassed by way of written submissions. Vide the written submissions dated 28.02.2024, the applicants urged that despite being gazetted, Sankuri sub county has never been officially launched. That the establishment of the said sub county was not subjected to public participation exercise as required under article 10 of the Constitution which obliges the respondents to comply.
 7. It was the applicants' case that the orders herein were sought to ensure that the status quo and the substratum of the petition herein is maintained and preserved respectively. The applicants urged that



- they are apprehensive that if the sought orders are not issued by this Honourable Court, then the respondents may proceed to launch the sub county and its headquarters and consequently defeat the course of justice.
8. The applicants urged that no prejudice will be suffered by the respondents should the orders herein issue for the reason that in as much as the sub county has been gazetted, the same has not been launched. This court was therefore urged to allow the prayers sought.
 9. The respondents despite being served with the pleadings did not enter appearance nor respond to the application. It is trite that an unopposed application does not automatically succeed. The applicant is under obligation to convince the court that he or she deserves the same and that it is for the court to determine the same on merit. See *Gideon Konchellah Sitelu v Julius Sunkuli Lekakeny* (2018) eKLR.
 10. From the foregoing, it is clear that the main issue for determination is whether in the given circumstances, a conservatory order ought to issue.
 11. The principles guiding the grant of conservatory orders in Kenya are well settled. The Supreme Court in Civil Application No 5 of 2014 *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others* (2014) eKLR, 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.”
 12. A Conservatory order is therefore aimed at preserving the substratum of the matter pending the determination of the main issue/s in dispute.
 13. Given the interlocutory 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 for the reason 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 v Attorney General* (2011) eKLR.
 14. The first principle in considering whether conservatory orders ought to issue is that the applicant must demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice.
 15. The second principle is that the Court should decide whether a 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. The third principle is 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 *Nubian Rights Forum & 2 others v Attorney General & 6 others* [2020] eKLR.
 16. The question therefore is whether the applicants have satisfied the above conditions.
 17. As to the establishment of a *prima facie* case with a likelihood of success and likelihood on the part of the applicants to suffer prejudice unless the orders are granted, it has been held that a prima facie case is not a case which must succeed at the hearing of the main case. In other words, it has to be shown that a case which discloses arguable issues has been raised and in this case, arguable constitutional issues.



18. In the instant case, the applicants' case is hinged on the fact that the respondents caused the creation of Sankuri sub county and the establishment of its headquarters without considering the serious ramifications on the residents of the merged divisions. That in doing so, they neither consulted nor collected the views of the said residents before creating the Sankuri sub county and the establishment of its location headquarters at Balambala (Fatuma Golicha Center).
19. This court has weighed, albeit preliminarily the pleadings herein vis a vis the remedies sought in light of 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 when the Constitution has been contravened, or is threatened with contravention.
20. In the absence of any response, it is my conviction that the applicants have established a prima facie case under Article 10 of the Constitution.
21. As to whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights, I note that the application/petition is hinged on the allegation on violation of articles 3(1),10 (2),22,23,27,35,47,165 and 258(1) of the Constitution. It is trite that the Constitution is the supreme law of the land thus binds all persons and all state organs at both levels of government.
22. Therefore, every member of the public whether individually or collectively is enjoined to respect, uphold and defend the Constitution. See the holding in the Case of Law Society of Kenya v Officer of the Attorney General & another; Judicial Service Commission (Interested Party) [2020] eKLR where Makau J held that any alleged violation of the Constitution by any individual is a very serious matter and an affront to Constitutionalism and therefore, sets a dangerous precedent in the violation of the Constitution which if not checked, can result in a serious harm to the country and every citizen. In my view, denial of the conservatory orders will not enhance the said constitutional values aforesaid.
23. As to whether the petition or its substratum will be rendered nugatory if the interim conservatory orders are not granted, I note that the petition is premised on the alleged violation of the petitioners' rights under the Constitution. Amongst the reliefs sought are lack of public participation in the creation of the Sankuri sub county and the location of its headquarters. I am alive to the fact that at this stage, this court is not supposed to examine the merits of the petition but has to consider whether the applicants have established a prima facie case to warrant interim orders so as to secure the substratum of the petition and not to render the petition nugatory and become a mere academic exercise.
24. As to consideration of public interest and relevant material facts exercising the discretion on whether or not to grant interim conservatory orders, the court in the case of Martin Nyaga Wambora v Speaker of The County Of Assembly of Embu & 3 others [2014] eKLR observed that where a conservancy order is sought against a public agency like a legislative assembly that is mandated to carry out certain functions in the normal course of its business, it is only to be granted with due caution. That the interruption of the lawful functions of the legislative body should take into account the need to allow for their orderly functioning in the public interest. Further that the court will only issue conservatory orders in exceptional circumstances and will be minded of the mandate of other constitutional organs in exercise of their constitutional mandate.
25. It is my considered view that the applicants herein have satisfied the aforesaid principles in regard to the granting of interim or conservatory orders and as such, the orders that are commendable to me are follows:



- i. A conservatory order be and is hereby issued prohibiting the respondents from launching Sankuri Sub County and its proposed headquarters pending the hearing and determination of this petition.
- ii. A conservatory order be and is hereby issued prohibiting the respondents from establishing Shimbirey or any other administrative unit as the Sankuri Sub County headquarters pending the hearing and determination of this petition.
- iii. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF MARCH 2024

J.N.ONYIEGO

JUDGE

