



**Bundid & another v Ministry of East African Community
(EAC), the Asals and Regional Development & 3 others (Petition
E002 of 2024) [2024] KEHC 3479 (KLR) (26 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3479 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
PETITION E002 OF 2024**

JN ONYIEGO, J

MARCH 26, 2024

**IN THE MATTER OF ARTICLES 1(1),19,20,22, 23(1),
27 AND 201 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF DISCRIMINATION AND FAILURE TO CONDUCT PUBLIC
PARTICIPATION IN PROJECT IDENTIFICATION AND BUDGETING FOR LAGDERA SUB
COUNTY COMPONENT ONE SUB PROJECTS FOR THE FINANCIAL YEAR 2023 – 2024**

BETWEEN

ABDIAZIZ MOHAMED BUNDID 1ST PETITIONER

KHALIF FARAH ZUBER 2ND PETITIONER

AND

**MINISTRY OF EAST AFRICAN COMMUNITY (EAC), THE ASALS AND
REGIONAL DEVELOPMENT 1ST RESPONDENT**

**NATIONAL PROJECT COORDINATOR, KENYA DEVELOPMENT RESPONSE
TO DISPLACEMENT IMPACTS PROJECT (KDRDIP) 2ND RESPONDENT**

**GARISSA COUNTY PROJECT COORDINATOR, KENYA DEVELOPMENT
RESPONSE TO DISPLACEMENT IMPACTS PROJECT (KDRDIP) 3RD
RESPONDENT**

ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. The applicants’ application before me for determination filed by the Firm of Nyipolo Advocates is dated 15-01-2024. It is anchored on the grounds set out on the face of it and further supported by



the averments contained in the supporting affidavit of Abdiaziz Mohamed Bundid, the first applicant/ petitioner herein sworn on the same day on his own behalf and that of the 2nd applicant/ petitioner. The following are the prayers sought in the said application;

- i. Spent.
 - ii. Conservatory orders do issue restraining the respondents from any further implementation of any of the projects proposed in the impugned 'Lagdera Sub County component one Sub projects FY 2023 – 2024 Half AIE' and from disbursing project funds to community sub project accounts pending the hearing and determination of this application.
 - iii. Conservatory orders do issue restraining the respondents from any further implementation of any of the projects proposed in the impugned 'Lagdera Sub County component one Sub projects FY 2023 – 2024 Half AIE' and from disbursing project funds to community sub project accounts pending the hearing and determination of this petition.
 - iv. Costs of the application.
2. The applicants' case is hinged on the fact that the respondents are currently implementing the Kenya Development Response to Displacement Impacts Project, hereinafter KDRDIP; a government of Kenya project whose aim is to improve access to basic social services, expand economic opportunities and enhance environment management for communities hosting refugees in Kenya.
 3. That the respondents have unlawfully allocated financial resources towards the implementation of the impugned projects without due public participation in due disregard of articles 10(2) and 201 of *the constitution*. The respondents allegedly violated article 27 of *the constitution* by unfairly distributing development projects and financial resources by discriminating against the people of Shanta Abaq Sub County, whose three electoral wards, Baraki, Sabena and Goreale have been allocated Kes. 15,000,000/- as compared to the electoral wards of Benane and Maalimin which cumulatively have been awarded Kes. 127,200,000/- out of a total amount of 175,700,000/-. This court was therefore urged to issue orders restraining the respondents from proceeding with the said plan as the same if unstopped would cause irreparable damage to the Shaba Abaq Sub County.
 4. As a response, the respondents filed grounds of opposition dated 02.02.2024 opposing the petitioners' application urging that a strict interpretation of article 23(3)(3)(c) of *the constitution* notes that a relief for conservatory orders is prima facie only available when a party alleging a right or fundamental freedom in the Bill of Rights has been denied. That the petition and the application herein are not premised on any allegation founded on the violation of a fundamental right or freedom in the Bill of Rights to warrant this court's intervention. That be it as it may, a mere allegation of contravention of a right or fundamental freedom is not of itself sufficient to entitle grant of conservatory orders.
 5. It was averred that at this stage, if the orders sought are granted, the same may go contra to the principle of omnia presumuntur rite et solemniter esse acta, donec probetur in contrarium which means that all acts are presumed to be rightly done until proven otherwise. That the petitioners did not demonstrate any prejudice or irreparable harm, damage or injury suffered or likely to be suffered if the court does not intervene.
 6. This court was referred to article 259 of *the constitution* to wit that in considering the constitutionality of any issue before it, it should interpret *the constitution* in a manner that promotes inter alia; its purposes, values and principles. In the end, the respondents urged the court to decline the invite for issuance of conservatory orders at this stage.



7. The court directed that the application be canvassed by way of written submissions and both parties complied with the said directions.

The Applicant's Submissions:

8. In further support of its case, the applicant filed written submissions and a bundle of authorities both dated 09.02.2024. Counsel urged that the only issue due for determination is whether the applicants had satisfied the pre-conditions necessary for grant of conservatory orders. To buttress that position, reliance was placed on the holding in the case of the Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR, where conditions necessary before a court can issue conservatory orders were discussed. Counsel contended that the foremost thing that an applicant must do is to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders, he is likely to suffer prejudice.
9. That the respondents unlawfully developed and imposed community projects on the people of Lagdera Sub County without the input of the affected communities by failing to conduct due public participation. It was submitted that the impugned projects were unfairly distributed in a way that Shanta Abaq Sub County's three electoral wards, Baraki, Sabena and Goreale were allocated a sum of Kes. 15,000,000 as opposed to Benane and Maalimin which cumulatively were allocated Kes. 127,200,000 out of a total of Kes. 175,700,000. Counsel contended that, the move by the respondents was manifestly discriminatory thus demonstrating that the applicants have an arguable case with a high probability of success.
10. On whether a grant of the sought orders will enhance the constitutional values and objects, Counsel contended that article 201 of *the constitution* underscores the need for public participation as a principle that shall guide public finance. Reliance to that end was placed on the case of Law Society of Kenya v Officer of the Attorney General & Another; Judicial Service Commission (Interested Party) [2020] eKLR where it was held that every person is enjoined to protect *the constitution* and that every possible threat of violation of *the constitution* must be curtailed.
11. That having in mind that the respondents did not engage the said communities on what projects to implement and further, allocating government funds unproportionally, a grant of the sought orders will enhance national values and principles of good governance as well as the objects of the Bill of Rights which were allegedly violated by the respondents.
12. On whether failure to grant the orders will render the petition nugatory, Mr. Nyipolo stated that the respondents have already procured authority to incur expenditure in relation to the impugned projects and what remains therefore is disbursement of the said monies to community sub project accounts for purposes of implementation. Reliance was placed on the case of David Ndi & Others v Attorney General & Others [2021] eKLR where the High Court issued conservatory orders to avert possibility of the country losing billions of shillings in a process that the court could later find to be unconstitutional which in turn would render the determination of the petition an academic exercise. This court was therefore urged that unless it intervenes, there is a high likelihood that the impugned projects will be implemented to the detriment of the affected communities.
13. That it was in the interest of the public to grant the orders sought as the 1st, 2nd and 3rd respondents acted in total disregard of *the constitution* and their electorate by developing community projects without the participation of the intended beneficiary community. This court was therefore urged to find in favour of the applicants herein and issue the sought orders.



14. The respondents in opposing the sought orders filed their submissions dated 21.02.2024. Learned counsel invited the court- to the holding in the case of Gatirau Peter Munya v Dickson Mwendwa Kithinji & 2 Others (2014) eKLR, SC Application No. 4 of 2014 where it was held that a party who moves the court seeking conservatory orders must show to the satisfaction of the court that his or her rights are; under threat of violation; are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted.
15. It was contended that a mere allegation of contravention of a right or a fundamental freedom is not of itself sufficient to entitle grant of the conservatory orders. That the petitioners must demonstrate real danger that is so actual, so imminent, so evident and so true so as to warrant the immediate intervention of the court. Further reliance was placed on the case of Centre for rights Education and Awareness (CREAW) & 7 Others (2017) eKLR where it was held that a party seeking conservatory orders only requires to demonstrate that unless the court grants the conservatory order, there is real danger that he/ she will suffer prejudice as a result of the violation of *the constitution*. That in the instant application, the applicants did not point out with reasonable exactitude the rights to have been denied, violated or infringed or threatened apart from alleging lack of public participation.
16. It was contended that the grant of the sought orders would most likely injure the public interest as opposed to protecting it as the impugned project aims at improving the basic social services, expand economic opportunities and enhance the environment management of communities hosting refugees. Further, it was opined that the impugned Sub County Component One Sub projects is for the FY 2023 -2024 and it being a public knowledge, the same ends on 30.06.2024 hence a grant of the orders sought would terminate any intended implementation of the projects before the financial year ends. It was urged that the application be dismissed and the petition be set down for hearing on a priority basis.

Analysis and determination

17. Having considered the application herein, the response thereof and submissions by both parties, the only issue which germinates for determination is; whether the applicants have met the threshold for grant of conservatory orders.
18. The principles guiding 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 Kithinji & 2 others (supra) 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.
19. Conservatory orders are, therefore, aimed at preserving the substratum of the matter pending the determination of the main issues in dispute.
20. 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.



21. In the case of *Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board & others* Nairobi High Court Constitutional Petition No 154 of 2016 (2016) eKLR the court summarized three main principles for consideration on whether to grant 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.
22. Therefore, it is incumbent upon the applicant to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders, he is likely to suffer prejudice. See the holding before the Court of Appeal in the case of *Mirugi Kariuki v Attorney General* Civil Appeal No 70 of 1991 (1990-1994) EA 156 (1992) KLR 8].
23. It is worth noting that should not be lost that potential arguability is not enough to justify a conservatory order but rather there must also be evidence of a likelihood of success. In the instant case, the applicant urged that the respondents unlawfully developed and imposed community projects on the people of Lagdera Sub County without their input. In the same breadth, it was argued that the impugned projects were unfairly distributed in a way that Shanta Abaq Sub County's three electoral wards, Baraki, Sabena and Goreale were allocated a sum of Kes. 15,000,000 as opposed to Benane and Maalimin which cumulatively were allocated Kes. 127,200,000 out of a total of Kes. 175,700,000.
24. The respondents did not deny the said allocation nor did they justify the variance. In my considered view, the conduct of the respondents ought to be critically looked into as the allegations raised touch directly on the provisions of *the constitution* particularly Article 27 of *the constitution*. It is against that backdrop that I hold that the applicants have made out a prima facie case in the circumstances herein. See *Jimaldin Adan Ahmed & 10 Others v Ali Ibrahim Roba and 2 Others* [2015] eKLR].
25. Once the applicant has established to the court's satisfaction a prima facie case with a likelihood of success, the court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights. The applicant herein urged that the respondents have unlawfully allocated financial resources towards the implementation of the impugned projects in disregard of articles 1(1), 19, 10(2), 22,23(1) and 201 of *the constitution* and further, article 27 of *the constitution*.
26. It is in the foregoing, that *the constitution* calls upon every person to respect, uphold and defend it. Article 3(1) further and unequivocally states that the values and principles contained therein must apply to all and sundry. It therefore follows that the provisions of *the constitution* must not only be respected but also to be upheld at all times. See *Patrick Musimba vs The National Land Commission & 4 Others* HCCP 613 of 2014 (No. 1) [2015] eKLR and also *Satrose Ayuma & 11 Others vs Registered Trustees of Kenya Railways Staff Retirements Benefits Scheme* [2011] eKLR.
27. Flowing from the first two principles, the court must answer the question whether if the conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and so far as possible secure any transitional motions before the court so as not to render nugatory the ultimate end of justice. In this respect, see paragraphs [59], [60] and 61 thereof in the case of *Martin Nyaga Wambora vs Speaker of the County Assembly of Embu & 3 Others* CP No. 7 of 2014.



28. The petitioners urged that the respondents have already procured authority to incur expenditure in relation to the impugned projects and what remains therefore is disbursement of the said monies to community sub project accounts for purposes of implementation. The same was to some extent confirmed by the respondents that the impugned project is for the FY 2023 -2024 and the same ends on 30.06.2024. It therefore follows that failure to grant the orders herein will truly render the petition nugatory as the financial period as stated by the respondent is fast approaching. It therefore apparent that if the said orders are not granted, then the petition maybe overtaken by events thus denying the applicants a chance to air their grievances and at the same time, an opportunity to be heard.
29. The fourth principle which emerges from the various cases and is well captured by the Supreme Court of Kenya in the case of *Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others* [supra] is that the court must consider conservatory orders also in the face of the public interest dogma expressed as hereunder;
- “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 adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions linked to such private-party issues on the “prospects of irreparable harm occurring during the pendency of a case; or “high probability of success” in the applicants case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case bearing in mind the public interest the Constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes”.
30. Public interest demands that *the Constitution* and the law be respected and upheld. Having said so, I must point out that whereas there is the need to improve the basic social services, expand economic opportunities and enhancement of environment management of communities hosting refugees, the said process must comply with the provisions of *the constitution* and the relevant laws and procedures.
31. In the exceptional circumstances of this matter, this court finds that public interest tilts in favor of the applicants.
32. Having held as above, the upshot of it all is that the application is upheld and the following orders hereby issue: -
- i. A conservatory order be and is hereby issued restraining the respondents from any further implementation of any of the projects proposed in the impugned ‘Lagdera Sub County component one Sub projects FY 2023 – 2024 Half AIE’ and from disbursing project funds to community sub project accounts pending the hearing and determination of the petition herein.
 - ii. That due to the urgency noted, the petition to be heard by way of reliance on the pleadings, affidavit evidence and written submissions.
 - iii. The respondents shall within five days hereof file and serve responses
 - iv. The petitioners shall, thereafter, and within seven days of service file any supplementary responses, if need be, together with written submissions on the petition.
 - v. The respondents and the interested parties shall file and serve their respective written submissions within 7 days of service.
 - vi. Highlighting of submissions 25th April 2024.



DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 26TH DAY OF MARCH
2024

J.N.ONYIEGO

JUDGE

