



**Okoti v Otuoma & another; Athi Limited & 4 others (Interested Parties)
(Petition E001 of 2024) [2024] KEHC 3007 (KLR) (22 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3007 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
PETITION E001 OF 2024
WM MUSYOKA, J
MARCH 22, 2024**

BETWEEN

OKIYA OMTATAH OKOITI PETITIONER

AND

**HE DR. PAUL NYONGESA OTUOMA, THE GOVERNOR OF BUSIA
COUNTY 1ST RESPONDENT**

COUNTY GOVERNMENT OF BUSIA 2ND RESPONDENT

AND

ATHI LIMITED INTERESTED PARTY

**THE ETHICS AND ANTI-CORRUPTION COMMISSION ... INTERESTED
PARTY**

BUSIA BUSINESS OWNERS ASSOCIATION INTERESTED PARTY

ABDIKADIR HASSAN HUSSEIN INTERESTED PARTY

FATUMA BILLE INTERESTED PARTY

RULING

1. I am tasked with determining a Motion, dated 19th February 2024. The same seeks 1 principal order, although framed as 2, for suspension or prohibition of 2 ongoing projects, namely the construction of a trailer park at Mundika and procurement and distribution of kiosks within Busia town. The secondary order is for joinder other relevant parties.
2. The factual background is given in the grounds set out on the face of the application, and in the affidavit sworn in support, by the petitioner, Okiya Omtatah Okoiti, on 19th February 2024. The respondents are said to have embarked on the construction of the trailer park, despite failing to disclose how the



procurement for the same was done, after the petitioner had written to them letters, dated 31st August 2023, 12th January 2024 and 25th January 2024, together with others that were written by his staff, asking to be furnished with documents that have been detailed in the application. The matter is said to be urgent as demolition and reconstruction of kiosks was going on, despite the information sought not being disclosed. It is also stated that the 2nd respondents financial year 2023/2024 is set to end in about 3 months' time. The petitioner argues that the failure by the respondents to disclose the information that he has sought from them, violates *the Constitution*, and a variety of statutes. He avers that access to information is a constitutional right, and that his petition seeks to have the respondents compelled to provide all the information and documents requested for.

3. Upon being served, the 1st respondent filed a notice of preliminary objection, dated 27th February 2024, articulating several grounds, namely: that the leasing and construction of the trailer park were matters within the purview of the Environment and Land Court, and that the High Court had no jurisdiction, by dint of Articles 162(2) and 165(5) of *the Constitution*, to handle a dispute about them; that the doctrine of exhaustion of remedies applied, and the petitioner had not exhausted all the avenues, such as those provided for under the Privatisation Act, 2023, remedies available through the Senate, of which the petitioner is a member, remedies under the *Commission on Administrative Justice Act*, 2011, and remedies under the *Public Procurement and Asset Disposal Act*; and that the petition was defective for not joining the 2nd respondent.
4. Subsequently, the 1st respondent filed a replying affidavit, sworn on 28th February 2024. He avers that, although he is amenable to compliance with *the Constitution*, he is not an accounting officer of the 2nd respondent, and that the cause had been brought in persona rather than against the 2nd respondent. He states that the bulk of the information and documents, the subject of the petition was, sought by persons other than the petitioner, and the information and documents were availed. He further states that much of the information and documents were in possession of other officers and departments of the 2nd respondent. He states that the information that the petitioner sought in his official capacity, as Senator for Busia County, was availed to him officially, through the Clerk to the Senate and the Senate Public Accounts Committee, of which the petitioner is said to be a member. He asserts that there was no opaqueness with respect to the 2 projects that the petitioner seeks to have suspended, adding that the same were done transparently, through public participation. He avers that no public funds were spent on the construction of the trailer park, as the same was done through private investment by the 1st interested party, through a lease agreement, and, therefore, there was no procurement of the works. On demolition of kiosks, he states that notices were given, to persons who had encroached on public land, and demolitions followed thereafter. He has attached a bundle of documents, to support his case.
5. The Motion, dated 19th February 2024, was placed before me on 22nd February 2024, under certificate of urgency. I certified it as such, and I directed that it be served on the respondent and the interested parties, for hearing inter partes on 26th February 2024. Upon the other parties being served, the matter was before me on 26th February for inter partes hearing, when the respondent and the other parties requested for time to file responses. I gave directions for filing of such responses, within 48 hours, and also directed that the Motion be argued by way of written submissions, to be highlighted on 29th February 2024. The principal parties, that is to say the petitioner and the 1st respondent, filed their respective written submissions, both dated 28th February 2024. They were highlighted on 29th February 2024. It may be well to mention that orders were made to join or add more parties to the cause, being the 2nd respondent, and the 3rd, 4th and 5th interested parties.
6. The petitioner submits on 3 issues: the conditions for grant of conservatory orders, a strong *prima facie* case, and the suit being nugatory should conservatory orders not being granted. On the first issue, of the



conditions for grant of conservatory orders, he argues that a *prima facie* case should be demonstrated, and so should the imminence of the danger of the cause being rendered nugatory, and demonstration of how public interest plays out. *Augustin Michael Murandi & 2 others v Noituresh Loitokito Water and Sanitation Co. Ltd (successor in title of National Water and Pipeline Conservation)* [2017] eKLR, *James Mariega Obonyo & 2 others v Fund Manager Suna West National Government Constituency Development Fund Committee & another* [2020] eKLR, *Michael Osundwa Sakwa v Chief Justice and President of Supreme Court of Kenya & another* and *County Assembly of Machakos v Governor, Machakos County & 4 others* [2019] eKLR are cited to set out the principles upon which conservatory orders may be granted. On *prima facie* case, he submits that he had demonstrated in his petition, how he had sought information, and the same was not availed, yet he had a constitutional and legal right to access that information. He relies on sections 7(1) and 9(1)(6) of the *Access to Information Act*, 2016; *Augustin Michael Murandi & 2 others vs. Noituresh Loitokito Water and Sanitation Co. Ltd (successor in title of National Water and Pipeline Conservation)* [2017] eKLR; *County Assembly of Machakos v Governor, Machakos County & 4 others* [2019] eKLR; *Mrao vs. First Bank of Kenya Limited & 2 others* [2003] KLR 125 [2003] eKLR and *Giella v Cassman Brown and Company Ltd* [1973] EA 359 are cited on what constitutes a *prima facie* case. *Martin Nyaga Wambora v Speaker of the County Assembly of Embu & 3 others* [2014] eKLR is cited, on the aspect of not granting conservatory orders rendering the petition nugatory. It is argued that there was imminent danger that if the conservatory orders are not granted, suspending the projects, the same would be concluded, rendering the cause herein academic. It is submitted that if the orders are not granted, there would be nothing to stop the kiosks being allocated and constructed, and the construction of the trailer park completed. The submissions on public interest appear to address a matter that is not before me, for they refer to vacant positions at Kenya Revenue Authority, but *Mumo Matemu v Trusted Society of human Rights Alliance & 5 others* [2014] eKLR and *Dr. Christopher Ndarathi Murungaru vs. AG and another* Civil Application No. Nai 43 of 2006 (24/2006) are cited, on what constitutes public interest.

7. The 1st respondent identifies 2 issues for determination, being whether the orders sought should be granted, and on costs. *Giella v Cassman Brown & Co. Ltd* and *National Bank of Kenya Ltd & 2 others v Sam-Con Ltd* [2003] eKLR are cited on the requirements for grant of temporary injunctions or conservatory orders, and a *prima facie* case with probability of success, possibility of irreparable loss not compensable in damages and balance of convenience. Order 40 Rules 1 and 2 of the *Civil Procedure Rules* is cited to provide additional circumstances under which a court may grant an injunction. On the principles which guide grant of conservatory orders, *Board of Management of Uburu Secondary School v City County Director of Education & 2 others* [2015] eKLR is cited, where the court identified existence of a *prima facie* case, likelihood of suffering prejudice if the orders are not granted, whether denial of the order would enhance the values and objects of *the Constitution*, and whether the substratum of the petition would be rendered nugatory. On the nature of conservatory orders, the 1st respondent cites *Katiba Institute v Judicial Service Commission & 2 others; Kenya Magistrates and Judges Association & 2 others* [2022] KEHC 438 (KLR), where *Muslim for Human Rights (Muhuri) & 2 others v Attorney General & 2 others* [2011] eKLR (Ibrahim, J) was mentioned with approval, to warn that the court ought to proceed with caution, to obviate determining the petition finally at the interlocutory stage.
8. From the authorities cited by both sides, the parties herein are agreed on the parameters within which conservatory orders are to be granted, and I have identified 3 principles from those authorities: likelihood of success, possibility of the petition being rendered nugatory should the orders not be granted, and public interest.
9. The petition principally is about access to information. The claim is that the petitioner has sought certain information from the respondents, and the same has not been availed. He asserts his



constitutional and legal right to that information, and he has come to court to have the respondents compelled to avail that information. The bulk of the orders sought are declarations around the matter of access to information. There is a mandamus order sought to compel disclosure of certain documents. He also seeks orders with relation to the 2 projects, for them to be declared irregular and improper, and a certiorari to quash the impugned procurement for the construction of the trailer park and the new kiosks and their allocation. The response, filed by the 1st respondent, acknowledges the right by the petitioner to access the information sought, adding that most of it has been furnished. It is further stated that the trailer park was not being constructed with public funds, but it was being done by a private developer, who has leased the land from the 2nd respondent.

10. So, is there a *prima facie* case presented in the material filed? The foundation of this cause is access to information. There is back and forth, between the principal parties, on whether or not the information was furnished. Whether it was or not given is a matter to be determined at the hearing of the petition. For now, I note that both sides agree that the petitioner has a right to such information as sought. If it was availed, then there would be no foundation for the petition, if it was not then the petitioner would have a good case. I have perused the bundle of documents filed by the respondents, most relate to notices to traders within Busia town, meetings with stakeholders, cabinet documents, reports from the Auditor-General, correspondence with the County Assembly, amongst others. From the bundle, I have seen only 2 letters addressed to the petitioner, from the Deputy Governor, relating to disposal of medical waste. There is a letter addressed to Clerk of the Senate, about information that the petitioner had sought from the 2nd respondent. The said letter seeks guidance on how the 2nd respondent could go about that, in my understanding, in terms of whether that information could be given directly to the petitioner, or it could be channelled indirectly through the Senate. I have not seen a reply to that letter. The sense I get is that there could be a *prima facie* case, with some probability of success, with respect to access to the information and documents sought in the petition.
11. On public interest, the information sought appears to relate to the construction of a trailer park on public land, and on allocation of space for kiosks, and construction thereof on public land, within Busia town. These are issues of public interest. After all, the devolved government is largely in the business of public interest, for it is established through elections by public suffrage, with the mandate to offer services to the public. So, whatever the 2nd respondent does or undertakes, would be a matter of public interest.
12. On the possibility of the petition being rendered nugatory or academic, should the conservatory orders be denied, I must start by stating that the cause herein is about access to information. The petitioner complains that he has sought certain information and documents, which have not been given to him by the respondents. That is the foundation of this cause. That information relates to the construction of the trailer park and the matter of the kiosks. The majority of the declarations that he seeks are around that theme, of access to information. That, to me, is the substratum of the petition. Of course, some of the orders are about the 2 projects being declared irregular and improper, and a certiorari to quash the process about and around them. However, my understanding is that the information that the petitioner is seeking relates to these 2 projects, to inform him as to their regularity, propriety and legality. He does not have that information yet, and from what I have seen, from his filings, there would be nothing that supports these latter prayers, principally because this cause is about access to information, and not the legality, or regularity, or propriety of the processes on the construction of the trailer park and kiosks. There is some element of remoteness between the prayers for access to information, on the one hand, and those relating to the construction of the trailer park and allocation of the kiosks being irregular and improper, on the other. The latter appear to be premature. Consequently, in my view, the failure to grant the conservatory orders sought would not destroy the substratum, or break the backbone, of the petition, which is access to information.



13. I am persuaded, from the material on record, that a case has not been made out, for grant of the conservatory orders sought, in prayers 3 and 4 of the Motion, dated 19th February 2024. I hereby decline to grant it. Instead, I shall dismiss the Motion, as I hereby do, with no order on costs.
14. To move the matter forward, I do hereby direct that the petition, dated 19th February 2024, be canvassed by way of written submissions, to be filed and exchanged within 21 days. The matter shall be mentioned, for compliance, and further directions, on a date that I shall allocate at the delivery of this ruling. It is so ordered.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 22ND MARCH 2024

W. MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Okoiti, the petitioner, in person.

Mr. Omboko and Mr. Wambura, instructed by the County-Attorney, for the respondents.

Mr. Hussein, instructed by Wetangula Adan & Company, Advocates for the 1st interested party.

Ms. Ayungu, Advocate for the 2nd interested party.

Mr. Omeri, instructed by Omeri & Associates, Advocates for the 3rd interested party.

Mr. Ashioya instructed by Ashioya & Company, Advocates for the 4th and 5th interested parties.

