



**East Africa Tour Guides Association & 2 others v Narok County Government & another
(Constitutional Petition E008 of 2023) [2024] KEHC 4646 (KLR) (29 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4646 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CONSTITUTIONAL PETITION E008 OF 2023**

F GIKONYO, J

APRIL 29, 2024

BETWEEN

EAST AFRICA TOUR GUIDES ASSOCIATION 1ST PETITIONER

CONFEDERATION OF KENYA TOUR GUIDES 2ND PETITIONER

KENNEDY KAUNDA OMUGA 3RD PETITIONER

AND

THE NAROK COUNTY GOVERNMENT 1ST RESPONDENT

THE OFFICE OF THE GOVERNOR, NAROK COUNTY 2ND RESPONDENT

RULING

Conservatory Order

1. Before this court for determination is a notice of motion dated 03/07/2023 filed by the petitioners/ applicants herein. The petitioners/applicants seek the following orders;
 1. Spent.
 2. Spent.
 3. That Pending the hearing, determination, and final determination of this petition, an interim order be and is hereby issued suspending the implementation of the first schedule of the Narok County Finance Act, 2022 with respect to Maasai Mara National Reserve Park fees charges, as communicated, vide public notice dated 14th June 2023 on the daily newspaper.
 4. That pending the hearing, determination and final determination of the petition, a temporary order of injunction be and is hereby issued prohibiting the respondents, either by themselves, their agents, and /or any other person(s) howsoever from acting and /or giving effect or implementing the first schedule of the narok county finance act, 2022 with respect to Maasai



Mara National Reserve Park fees charges s communicated vide a public notice, dated 14th June 2023 on the daily nation newspaper.

5. That the costs of this application be borne by the respondents.
2. The application is premised on Articles 2,3,10, 19, 20, 21,22,23, 24,35, 47,165(3), 199(1),232, 258, and 259 of *the Constitution*, Rule23(1), (2) and Rules 24(1) of *the Constitution* (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and section 2 of the Narok Finance Act 2022.
3. The application is based on the grounds set out on the face of the application and the supporting affidavit sworn by Kennedy Kaunda Omuga, the 3rd petitioner/applicant, and on behalf of the 1st and 2nd respondent on 03/07/2023.
4. The 1st and 2nd respondents opposed the application herein. The 1st and 2nd respondent filed a replying affidavit sworn by John Mayani Tuya on 10/07/2023.

Background of the case

5. The petitioners have been operating under a twenty-four-hour ticket rule which means that the amount chargeable for entry into the Maasai Mara National Reserve allows the petitioners and their clients to access the reserve for twenty-four hours.
6. On 14/06/2023, a public notice in the Daily Nation Newspaper titled Notice of the 12 hours rule for Maasai Mara National Reserve first schedule of the Finance Act 2022.
7. Section 2 of the Narok County Finance Act, 2022 as well as section 2 of the narok county finance bill, 2023 defines ‘park entry fees’ as an amount charged for entry into Maasai Mara from 6.00 a.m. to 6.00 p.m. time of entry notwithstanding.
8. As per the said notice, this directive was to be effected from 01/07/2023.
9. The said public notice attempts to impose new regulations to wit that the amount chargeable for entry into Maasai Mara National Reserve is a twelve (12) hours ticket applicable from 6.00 a.m. to 6.00 p.m., the time of entry notwithstanding.
10. On 26/06/2023, the 1st respondent sent a letter to the chief park warden and park accountant of the Maasai Mara National Reserve giving guidelines for further implementation of the twelve-hour ticket rule.
11. On 30/06/2023, the Kenya Tourism Federation wrote a letter to the CECM finance and economic planning county government of narok raising critical issues affecting the stakeholders and urging the county government to suspend the proposed changes until December 2023 to allow the tour guides honour their commitments in the current season.
12. The petitioners have filed the petition herein on the grounds that the respondents are purporting to implement this provision without following the due procedure of enforcement and lawful implementation.

Petitioner’s arguments

13. The petitioners contend that the notice is purported to have been issued pursuant to the Finance Act 2022 whereas the twelve-hour ticket rule is a new regulation in the narok county finance bill 2023 which is yet to be passed, assented to, and published as law.



14. The petitioners contend that the said twelve-hour ticket rule is unconstitutional, unlawful, illegal, unprocedural, null, and void ab initio as the same was reached arbitrarily and will disrupt and generally affect the tourism industry, not only to the local consumers but also internationally. This is for the reason that most bookings are made a year or two in advance and the changes made by the county will affect the advance bookings that have been made.
15. The petitioners' question procedure followed in the enactment of the Narok Finance Act for reasons that no stakeholder engagements were conducted.
16. The petitioners contend that the first schedule of the Narok County Finance Act, 2022 with respect to Maasi Mara National Reserve Park fee charges should be suspended and ultimately set aside for the following reasons;
 - i. Tourism worldwide follows a pre-sale model of business where safari bookings are made in and/ or sold a year in advance. a few safaris are sold on a walk-in basis;
 - ii. The introduction of the said twelve-hour ticket rule comes at a time when bookings have been made by tourists across the world owing to the fact that it's the high season, and the effect of the said rule will alter and/ or disrupt the already made bookings, which action will lead to cancellations, hence disrupting the industry seriously leading to huge losses;
 - iii. The 4-hour rule has been in use over the years and the same is being used across the country and region as the best practice.
 - iv. The net effect of the new rule will put the petitioners herein and all stakeholders in the industry at risk of making losses in millions if they will be required to spend more as a result of the said changes from their own pockets having entered into valid contractual obligations through the advance bookings.
 - v. The tourism sector has been hit heavily due to the COVID-19 pandemic, considering the prospects of having a huge number of tourists visiting Maasai Mara this season, it is retrogressive to introduce new changes and the twelve-hour ticket rule will inevitably paint the destination in a bad light internationally to the detriment of the petitioners and the country at large in terms of revenues.
 - vi. The petitioners contend that their petition discloses a prima facie case with high chances of success. they argued that the petitioners were not involved in the public participation as stakeholders in the enactment of the act. further that the act violates the petitioners' legitimate expectations.
 - vii. The petitioners contend that the balance of convenience greatly tilts on granting the order sought. they argued that they are likely to be prejudiced and to suffer irreparable losses. The respondent will not suffer prejudice if the said first schedule of the act is temporarily suspended to allow parties to undertake a procedural planning process if warranted. Furthermore, if the petitioners eventually win this petition, their petition will be rendered nugatory as the judgment would neither reverse nor compensate the intervening harm to the petitioners. Further failure to grant the orders sought will result in great prejudice to the public and public interest.



The 1st and 2nd Respondent's Arguments

17. The respondents contend that the twelve-hour ticket rule is not a new regulation under the proposed finance bill 2023 as the same has been incorporated pursuant to the Narok County Finance Act 2022 which came into operation on 01/01/2023.
18. The respondents contend that the public notice issued by the county executive committee regarding member finance and economic planning for the twelve-hour ticket rule directive stems directly from the Narok County Finance Act 2022 and not the narok finance bill, 2023 which is yet to be passed and enacted into law.
19. The respondents contend that it is within the mandate of the CECM finance and economic planning to publish in the Kenya gazette and vary and/ or amend any of the schedules.
20. The respondents contend that due procedure was followed for the implementation of the Finance Act, 2022 to which the twelve-hour ticket rule stems from. The narok county finance act 2022 is already in force therefore the twelve-hour directive is lawful and valid.
21. The respondents contend that the law is progressive and not retrospective. Therefore, the directive issued vide public notice dated 14/06/2023 shall apply progressively. If there are safaris that were booked prior to the commencement of the Narok County Finance Act, 2022 the previous legislation shall be applicable. Therefore, the petitioners shall not incur losses on previously booked twenty-four-hour tickets. This shall apply to tickets booked prior to 01/01/2023, when the Narok County Finance Act, 2022 came into force. The petitioners had 6 months period to communicate the changes to their clients from 01/01/2023 to 01/07/2023.
22. The respondents contend that despite the covid 19 pandemic counties have to ensure that they can raise adequate revenues despite the hard economic times as required under section 8 of the County Government Act.
23. The respondents contend that vide a public notice dated 26/10/2021, the county government of narok called for public participation in the county fiscal strategy paper and finance bill for the financial year 2022/2023. The said notice invited all stakeholders to submit a proposal on economic policy measures including county revenue enhancement strategies for consideration in the preparation of the county fiscal strategy paper and finance bill for the year 2022/2023. further the same was communicated vide Mayian FM and Emoo FM radio stations in narok on two consecutive days; 10/11/2021 and 11/11/2021.
24. The respondents contend that the petitioners did not take any steps to present their proposals to the county in preparation of the Narok County Finance Act 2022 therefore the bill was passed without their input. The petitioners' failure to respond to the public announcements calling for public participation cannot render the whole process illegal, irregular, or unlawful, or it violated their legitimate expectation as other members of the public participated in the same. They relied on section 133 of the Public Finance Management Act, article 174(c) and 196(1)(b) of the constitution, and section 87 of the county government act.
25. The Petitioner's Submissions
26. The petitioner submitted that



The 1st and 2nd respondent's submissions

27. The respondents submitted that the conditions for the grant of an interlocutory injunction are well settled. The respondents relied on the case of *Husus Mugiri v Music Copyright Society of Kenya & another* [2018] eKLR.
28. The respondents submitted that the petitioners have failed to demonstrate that there is a prima facie case with the likelihood of success for reasons that the petitioners have not adduced any evidence to that end. The respondents relied on the cases of *Mrao v First American Bank of Kenya Limited & 2 others* [2003] eKLR, *Ruth Wambui Ndirangu & 3 Others* [2021] eKLR, *Board of Management of Uhuru Secondary School Vs City County Director of Education & 2 Others* [2015] eKLR, and *Trust Bank Limited V Amin Company Ltd & Another* [2000] KLR 164.
29. The respondents submitted that the petitioners have not demonstrated the harm they are likely to suffer. The mere assertion of disruption of bookings has not been evidenced by the petitioners and does not in any way show the irreparable harm likely to be suffered by the petitioners. The respondents further submitted that the grant of the orders sought in the petition would unfairly prejudice the respondents as there would be no way for the collection of revenue lost if, at the end of the hearing of the petition, the court finds that the petition was unmerited. The respondents relied on the case of *Nguruman Limited Vs Jan Bonde Nielson & 2 Others* [2014] eKLR.
30. The respondents submitted that the balance of convenience tilts towards allowing the implementation of the said act. The respondents relied on the case of *Films Rover International vs Cannon Films Sales Ltd* [1989] 3 ALL ER 772.
31. The respondents submitted that there is a need not to grant final orders at the interim stage. Legislation should be impugned only when it has been proven to be unconstitutional, null and void. Suspension of statutes, statutory provisions, or even regulations should be wholly avoided except where national interest demands and the situation is certain. The respondents relied on the cases of *Okiya Omtatah Okioti V Attorney General & 5 Others* [2020] eKLR, and *Kizito Mark Ngaywa V Minister Of State For Internal Security And Provincial Administration & Another* [2011] eKLR.
32. The respondents submitted that the allegation that the stakeholders were not invited to public participation in the enactment of the act and introduction of the twelve-hour ticket rule may be showcased during the hearing of the petition. Therefore, the interim orders sought are not meritorious.

Directions of the court.

33. The application was canvassed by way of written submissions. The 1st and 2nd respondents' submissions are on record. The petitioners' submissions are not on record however an affidavit is on record to the effect that the petitioner served their written submissions.

ANALYSIS AND DETERMINATION.

34. I have considered the Petition, the Affidavits on record, and the submissions by both parties.

Issues

35. The main issue for determination: -
 - i. Whether this application has met the legal threshold for grant of conservatory orders.



36. The threshold for grant of conservatory orders was established by the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR 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 supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

(87) The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

(i) the appeal or intended appeal is arguable and not frivolous; and that

(ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

(88) These principles continue to hold sway not only at the lower Courts but in this Court as well. However, in the context of *the Constitution* of Kenya, 2010, a third condition may be added, namely:

(iii) that it is in the public interest that the order of stay be granted.

(89) This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through *the Constitution*.”

37. The principles applicable to the granting of conservatory orders have also been the subject of discussion by various Courts. A catalogue of some of these cases will not harm.

38. See *Petition E408 of 2020 Okiya Omtatah Okoiti v Judicial Service Commission; Philomena Mbeti Mwilu & another (Interested Parties)* [2021] eKLR that -

23. The locus classicus is the Supreme Court in *Civil Application No. 5 of 2014 Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others* (2014) eKLR where at paragraph 86 stated the Court stated as follows: -

(86) Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant courses.

24. In *Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others* Nairobi High Court Constitutional Petition No.154 of 2016 (2016) eKLR after going through several decisions, the



Court rightly so, summarized three main principles for consideration on whether to grant conservatory orders as follows: -

- (a) 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*.
- (b) Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
- (c) The public interest must be considered before grant of a conservatory order.

25. There is also the need to ascertain whether the conservatory order sought will delay the early determination of the dispute. (See Nairobi High Court Constitutional Petition No. E243 of 2020 Kenya Tea Development Agency Holdings Limited & 55 Others vs. The Cabinet Secretary Ministry of Agriculture, Livestock, Fisheries & Co-operatives & 2 Others and Kenya Small Tea Holders Growers Association (Kestega) (Interested Party) (unreported).

39. In Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 Others [2015] eKLR, the Court summarized the principles for grant of conservatory orders as: -

- (i) The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.
- (ii) The second principle is 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.
- (iii) Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
 - (i) Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.

40. Therefore, in granting a conservatory order, a Court of law should maintain a delicate balance that, the 'orders...facilitate ordered functioning within public agencies, as well as...uphold the adjudicatory authority of the Court, in the public interest (Peter Gatirau Munya supra).

41. Nevertheless, factors that may be considered may not be exhaustively listed as depending on the nature of the matter, the court may consider the effect of the conservatory orders on the determination of the case, imminent danger to infringement of the human rights and fundamental freedoms under the Bill of Rights, the applicability of the doctrine of presumption of constitutionality of statutes, whether the Applicant is guilty of laches, the doctrine of proportionality, among many others.

Prima facie case.

42. A prima facie case was defined in Mrao vs. First American Bank of Kenya Limited & 2 Others (2003) KLR 125 to mean: -

.... In a civil application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.

43. There is a string of judicial decisions on this subject refining it further. See The Court of Appeal in Nairobi Civil Appeal No. 44 of 2014 Naftali Ruthi Kinyua vs. Patrick Thuita Gachure & Another



(2015) eKLR, *Mirugi Kariuki -vs- Attorney General* Civil Appeal No. 70 of 1991 (1990-1994) EA 156, (1992) KLR 8, *In Re Bivac International SA (Bureau Veritas)* (2005) 2 EA 43.

44. Quite useful indents in the latter cases, the Court while expounding on what a prima-facie case or arguable case is, stated that such a decision is not arrived at by tossing a coin or waving a magic hand or raising a green flag, but instead a Court must undertake an intellectual exercise and consider without making any findings, the scope of the remedy sought, the grounds and the possible principles of law involved.
45. The Court must look at the case as a whole. The Petitioners' contention rested on the impact and processes of the adjustment of the park entry fees from the twenty-four-hour to twelve-hour ticket rule. They claim that the resultant effect would be the cancellation of the earlier bookings by tourists or the petitioner's members having to incur the payment of the difference in the rates from their pockets.
46. The processes towards the introduction of the impugned park entry fees were also questioned. Such include whether there was adequate public participation and the legal validity of the Gazettement.
47. The Respondents' common position is that the Petitioners failed to establish a prima-facie case. The Respondents gave several reasons to show that there was no breach of *the Constitution* and the law.
48. This Court has carefully weighed the rival positions. Whereas the Respondents do not deny the impact of the impugned fees/levies on tourists, they posited that the taxes were within the constitutional and legal confines. Further, the application of the said schedule is progressive and not retrospective.
49. Questions on alleged violation of provisions of *the Constitution* and the law cited by the Petitioners on public participation, social justice (article 10), imposition of taxes and levies (Article 201), among many other pertinent constitutional issues, arise in these proceedings.
50. The issues constitute prima-facie case in the circumstances of this case.

Irreparable damage/suffering prejudice

51. The petitioners argued that the substratum of the petition will be rendered nugatory if orders are not granted.
52. The petitioners also submitted that there will be no prejudice to the respondents as the petitioners and their members will continue to pay the currently applicable sums prior to the enactment of the impugned act.
53. The Respondents argued that the granting of the conservatory orders would impact the county's ability to finance its operations since the adjustment had already been factored in the Budget Policy Document and as such, the county stands to suffer prejudice if the adjustment is stopped.
54. This court has carefully considered these arguments and the facts of the case.
55. Whereas the petitioners argued that the Petition will be rendered otiose unless interim orders are granted, perusal of the Petition reveals that it seeks, inter alia, declarations that, several actions of the Respondents as well as some provisions of the Act in question, are unconstitutional for lack of public participation and non-adherence with the constitutional principles on imposition of taxes and levies. Such matters are to be determined in the Petition, and go beyond the interlocutory application.
56. There are also arguments on the law to which the impugned twelve-hour rule relates; is it 2121/2022 or 2022/2023 County Finance Act: thereby, blurring the vision of equity on the feasibility of interim equitable relief. The respondent also stated that there is already a 2023/2024 Finance Act in force



on the subject matter of these proceedings. The possibility of interim relief having been overtaken by events, is also real in this case, making resolution of the main petition the better and reasonable option.

57. In the circumstances, the obscurity will only be cleared at the trial rather than through interlocutory intervention.
58. Accordingly, it is the finding of this Court that, the Petition survives even if interim orders in the application are not granted. The petition should be heard in order for the court to fully and completely adjudicate upon the rights of the parties herein.

Public Interest:

59. 'Public interest' is defined by the Black's Law Dictionary 10th Edition at page 1425 as: -
The general welfare of a populace considered as warranting recognition and protection. Something in which the public as a whole has stake especially in something that justifies government regulation.
60. The county claims presumption of constitutionality of the legislation, and their constitutional mandate to finance public services through levies imposed by law. These are matters of public interest.
61. Nevertheless, strict adherence to *the Constitution* in public decision-making justifies exercise of public power by the Government-National or County. The requirement is a matter of public interest. The petition challenges the enactment of law which imposes levies in question by the County Government on constitutional fronts. These too are matters of public interest.
62. A delicate balance squares out these competing interests; an intellectual exercise and evaluation of these issues- it bears repeating- should be undertaken fully in the trial.

Where balance of convenience lies

63. In the upshot, the balance of convenience tilts in the rejection of the application, and in favour of the hearing of the main petition.

Conclusion and orders

64. The above analysis yields rejection of the application but on quite lawful option. The Notice of Motion dated 3rd July 2023 is hereby dismissed with no orders as to costs given the basis of the decision.
65. The main petition be fast tracked. Appropriate directions for expeditious disposal of this matter to be given by the court.
66. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 29TH DAY OF APRIL, 2024.

HON. F. GIKONYO M.

JUDGE

In the Presence of: -

Ms. Amuka holding brief for Manwa for the Petitioner – Present

Osongo for County Government – Present

Mr. Otolo – C/A

